No. 97-679-CFX Title: American Telephone and Telegraph Company, Petitioner
v.
Central Office Telephone, Inc.

Docketed: October 17, 1997 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Oct 16 1997	Petition for writ of certiorari filed. (Response due November 16, 1997)
	Nov 14 1997	Brief of respondent Central Office Telephone, Inc. in opposition filed.
	Nov 17 1997	Motion of United States Telephone Association, et al. for leave to file a brief as amici curiae filed.
	Nov 25 1997	DISTRIBUTED. December 12, 1997
	Nov 26 1997	Opposition of respondent to motion of United States Telephone Association, et al. for leave to file a brief as amici curiae filed.
	Nov 28 1997	Reply brief of petitioner AT&T Co. filed.
	Dec 12 1997	Motion of United States Telephone Association, et al. for leave to file a brief as amici curiae GRANTED. Justice O'Connor OUT.
	Dec 12 1997	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, January 23, 1998. The brief of respondent is to be filed with the Clerk and served uon opposing counsel on or before 3 p.m., Friday, February 20, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 18, 1998. Rule 29.2 does not apply. Justice O'Connor OUT. SET FOR ARGUMENT March 23, 1998. **********
	Jan 23 1998	Joint appendix filed.
	Jan 23 1998	Brief of petitioner AT&T Corp. filed.
	Jan 23 1998	Brief amici curiae of United States Telephone Association, et al. filed.
	Feb 6 1998	Record filed.
	Feb 13 1998	Record filed.
	Feb 20 1998	Brief of respondent Central Office Telephone, Inc. filed.
	Feb 20 1998	Brief amici curiae of Ad Hoc Telecommunications Users Committee, et al. filed.
	Feb 23 1998	CIRCULATED.
	Mar 4 1998	Motion of respondent Central Office Telephone to permit Ad Hoc Telecommunications Users Committee, et al. to present argument as amici curiae filed.
	Mar 13 1998	Reply brief of petitioner AT&T filed.
	Mar 20 1998	Motion of respondent Central Office Telephone to permit Ad Hoc Telecommunications Users Committee, et al. to present argument as amici curiae DENIED. Justice O'Connor OUT.
	Mar 23 1998	ARGUED.

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No. 97- OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP.,

Petitioner,

v.

CENTRAL OFFICE TELEPHONE, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in violation of the uniform holdings of this Court from *Chicago & Alton R.R.* v. *Kirby*, 225 U.S. 155 (1912), and *Davis* v. *Cornwell*, 264 U.S. 560 (1924), to *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), and *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U.S. 218 (1994), that a federally regulated carrier's filed tariff exclusively governs the legal relationship between customer and carrier and that those rights cannot be altered by the carrier's contract or tort, the Ninth Circuit improperly allowed state-law contract and tort claims based on a common carrier's failure to honor an alleged side agreement to give its customer better service than called for by the carrier's tariff?

LIST OF PARTIES AND AFFILIATES

The parties listed on the caption were the only parties to the proceedings below. American Telephone and Telegraph Co. has, since the inception of this case, changed its name to AT&T Corp.

Pursuant to Supreme Court Rule 29.1, AT&T Corp. declares that it has no parent. AT&T Corp. has an equity interest in the following publicly traded companies:

LIN Television Corporation;
American Mobile Satellite Corporation;
PriCellular, Inc.;
General Magic, Inc.;
Novell, Inc.;
Lanser Wireless Inc. (Canada); and
SmartTone Telecommunications Holdings Ltd. (Hong Kong).

AT&T Corp. owns an interest in the following non-publicly traded company, which has public debt outstanding:

AT&T Credit Holdings, Inc.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

No. 97——

AT&T CORP.,
Petitioner,
v.
CENTRAL OFFICE TELEPHONE, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner AT&T Corp. hereby petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Appendix to Petition for Certiorari ("App.") 1a-30a) is reported at 108 F.3d 981. The order of the court of appeals denying AT&T Corp.'s petition for rehearing and suggestion for rehearing en banc (App. 49a) is unreported. The order of the United States District Court for the District of Oregon entering judgment on a jury verdict for Central Office Telephone, Inc. and dismissing AT&T Corp.'s counterclaims (App. 48a) is unreported. The decision and opinion of the district court amending its judgment (App. 31a-47a) is also unreported.

JURISDICTION

The order of the court of appeals denying AT&T's petition for rehearing was entered on July 18, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are 47 U.S.C. §§ 201, 202, and 203, which are reproduced at App. 50a-53a.

STATEMENT OF THE CASE

In this case, a customer subscribed to receive a federally-tariffed telecommunications service from a common carrier. In accord with the Communications Act of 1934, the carrier's tariff set forth not only the "charges" for that service, but also the "classifications, practices, and regulations affecting such charges," including the terms under which the service would be "provisioned" (*i.e.*, the process of filling service orders) and billed. *See* 47 U.S.C. § 203(a). However, the customer then alleged the carrier's personnel had orally or impliedly promised it quicker provisioning, and different billing responsibilities, than those provided for in the tariff, and the customer sued the carrier under state law for breach of contract and tortious interference with contract when delays in provisioning and errors in billing occurred.

A divided Ninth Circuit panel held that such claims were properly submitted to the jury, and upheld a damages award based on them. The panel majority held that (1) "[b]ecause this case does not involve rates or rate-setting, but rather involves the provisioning of services and billing under several contracts, the filed-rate doctrine does not apply," and (2) the filed tariff doctrine in any event applies only to matters contained in the tariff, and does not prohibit side deals to supplement the tariff. App.

10a-11a. This holding is contrary to a century of uniform decisions of this Court (and other courts of appeals), and this Court has previously summarily reversed the Ninth Circuit for failing to follow these decisions. *See Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U.S. 533 (1983). This Court should follow the same course here.

1. Petitioner AT&T is a "common carrier" within the meaning of the Communications Act of 1934 ("the Act"). 47 U.S.C. § 153(h). It therefore must file with the Federal Communications Commission "schedules" (known as tariffs) of its "charges" and "the classifications, practices, and regulations affecting such charges" for its long distance services. 47 U.S.C. § 203(a). It further must provide service under rates, regulations, and practices that are just and reasonable (47 U.S.C. § 201(b)), and is prohibited from engaging in discrimination among customers that is unjust or unreasonable. 47 U.S.C. § 202(a).

Software Defined Network ("SDN") is a tariffed long-distance service that is offered by AT&T to meet the needs of large corporate customers with offices in multiple locations. SDN establishes a long distance network to connect the different locations of a customer and enables it to call others as well. Setting up an SDN network is a complex undertaking, but once the network is established, SDN customers that make large volumes of calls will pay lower rates than those for some other AT&T long distance services. Once an SDN network is established, an SDN customer can place an order to add or drop locations on its network. Additionally, AT&T's tariff provides for several billing options for SDN customers, including one in which AT&T sends bills directly to the individual locations on the network, although the subscriber remains responsible for all payments.

Prior to 1989, the only customer locations that could be connected to SDN networks were those that originated large volumes of traffic. In 1989, AT&T revised its tariff to add a new service feature (switched access) that

made it economical to hook up locations that originated small volumes of traffic. This new service arrangement was complicated to install, and there were a number of ways in which billing errors might occur. AT&T had made this change in order to make SDN even more attractive to large corporations.

However, the addition of the new service arrangement also made SDN attractive to substantial numbers of "resellers," who buy long distance services at volume discounts, and resell the services to many small customers at a marked-up price, retaining as profits the difference between the discounted price paid to AT&T for the service and the higher price charged to its own customers. Because many resellers could obtain SDN at lower rates than WATS or other AT&T services, resellers inundated AT&T with an unexpectedly large number of orders first to establish SDN networks and then to add new locations (*i.e.*, as the resellers signed up new customers). AT&T did not then have the mechanisms to process and provision the large volume of switched access orders that came from non-resellers as well as resellers, so it took far longer to provision the SDN orders submitted in 1990 and 1991 than it had taken to provision SDN orders previously or than it did after 1992.

Courts and juries have, to date, found that AT&T's conduct in providing SDN to resellers in this 1990-1992 period did not violate AT&T's substantive duties under §201(b), § 202(a), or § 203 of the Act.[1]

2. Respondent Central Office Telephone ("COT") was one SDN reseller. It purchased SDN from AT&T and resold it to its own customers from 1990 to 1992. Upon subscribing for SDN, COT signed an order form stating that its service relationship with AT&T "WILL BE GOVERNED BY THE RATES AND TERMS

[1] *See US WATS, Inc.* v. *AT&T*, No. 93-CV-1038 (E.D. Pa. Dec. 15, 1995); *Teledesign* v. *AT&T*, No. H-92-1919 (S.D. Tex. Apr. 21, 1994).

AND CONDITIONS IN THE APPROPRIATE AT&T TARIFFS." Excerpts of Record ("ER") 4575.

The SDN tariff specifically defined AT&T's responsibilities in provisioning orders for service and in billing SDN service. When an order for new service is placed, the tariff requires AT&T to establish the "due date" for provisioning the order that AT&T believes to be realistic based on conditions when the order is received. *See* AT&T Tariff F.C.C. No. 1, § 2.5.10; App. 55a. The tariff then requires AT&T to "make every reasonable effort to assure" provisioning of services by this "due date," but provides that if AT&T fails to do so, it has an additional 45 days from that date, after which time the customer could cancel its order without penalty if the order has not been filled. *Id.* The tariff further provides that AT&T has no responsibility for the allocation of charges for SDN service between a reseller or other customers and the individual locations on its network (*i.e.*, the reseller's customers). *See* AT&T Tariff F.C.C. No. 1, § 6.2.4; App. 56a.

AT&T's tariff further defines its liabilities for violations of its tariffs. For "nonwillful" violations, AT&T's liability is limited to a proportionate share of the applicable service charges for the affected period. *See* AT&T Tariff F.C.C. No. 1, § 2.3.1.A.; App. 54a. For "willful misconduct", there is no limitation on AT&T's liability. *Id.*

COT sued AT&T on November 27, 1991 in the district court for Oregon with jurisdiction based on 28 U.S.C. § 1332. COT did not claim that AT&T had violated its tariffs and thus violated Section 203 of the Act. 47 U.S.C. § 203. Nor did COT's complaint claim that AT&T had engaged in "unjust" or "unreasonable" "practices" or "unreasonable discrimination," in violation of Sections 201(b) and 202(a) of the Act. 47 U.S.C. §§ 201(b), 202(a). Instead, COT pursued state-law claims for breach of contract and for tortious interference with COT's contracts with its customers. These claims all rested on the allegation that the agreement between COT and AT&T was not limited to the terms of the tariff, but

also "included all the understandings that COT's president had from reading service brochures and from talking with AT&T representatives." App. 6a. In particular, COT claimed that AT&T employees had made enforceable oral agreements to provision COT's orders within 30 to 45 days and to assume responsibility for the accuracy of billings to COT's own customers. These alleged agreements were much more favorable to COT than the tariff.

3. AT&T asserted at each pertinent stage of the district court proceedings that these claims could not, as a matter of law, be a basis for imposing liability. It contended that COT's state-law contract and tort claims were preempted by the filed tariff doctrine of Section 203 of the Act. AT&T pointed out that AT&T's tariffs defined the features of SDN and AT&T's rights, duties, and liabilities in provisioning and billing services, that no claim had been made that AT&T had violated the tariff provisions, and that nearly a century of Supreme Court and other decisions hold that state-law contract or tort claims that a carrier has committed to provide services under more favorable terms than required by its federal tariff are preempted.

The district court rejected these claims. In denying summary judgment, it held "that the filed rate doctrine does not apply to the conduct alleged," because "[p]laintiff here is not disputing the reasonableness or validity of the filed rate, or of the tariff generally. Instead, it is complaining of the manner in which AT&T provided services for which it had contracted." Order on Summary Judgment (ER 137); *see* App. 7a. In denying a directed verdict, the district court ruled that "the tariffs control" only "to the extent they expressly refer to certain things," and that parties can enter into "side deals" that impose additional or supplemental duties to provide service on more favorable terms. Transcript 6/20/94 (ER 2459-60).

A jury found for COT on its state-law claims and rejected AT&T's counterclaim for unpaid tariff charges.

On November 9, 1994, the district court granted in part AT&T's post-trial motion for judgment as a matter of law, holding that there had been no competent evidence of damages for the period after COT had terminated its AT&T services in September 1992. The court therefore entered an amended judgment of $1,154,000. App. 47a.

4. On appeal, two members of the panel upheld the judgment on the grounds that (1) a regulated common carrier's federal tariff is conclusive only as to the carrier's rates and not as to "the provisioning of services," "billing," or other features that are provided in exchange for those rates (App. 10a), and (2) if the carrier's tariff does not encompass a particular subject (which the majority held was a question of fact for the jury) then a carrier and its customer may lawfully enter into "side deals" on that subject that are enforceable under state law. App. 11a.

Judge Brunetti dissented. Noting that the "plain language of the statute mandates that tariffs include both rates and underlying services," and that the tariff in this case prescribed the parties' rights and obligations regarding not only rates, but also provisioning and billing, he concluded that the majority had "erroneously narrow[ed] the scope of the doctrine" and that holding "that anything less than all material aspects of the provided services are covered by the tariff eviscerates the 'heart' of the Communications Act." App. 21a, 20a, 22a. As to the majority's second point, Judge Brunetti concluded that the majority had misunderstood another aspect of the filed tariff doctrine, namely that it "expressly prohibits a carrier from contracting for services not covered by the published tariff." App. 23a. Therefore, because COT had attempted to contract for services that were "not covered in the tariff at the tariffed rate," Judge Brunetti reasoned, the alleged contract was not enforceable. *Id.*

On July 18, 1997, the court of appeals denied AT&T's petition for rehearing and suggestion for rehearing en banc. App. 49a.

REASONS FOR GRANTING THE PETITION

This Court previously has summarily reversed a decision of the Ninth Circuit failing to apply the filed tariff doctrine according to its terms and this Court's precedents. *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U.S. 533 (1983). It should do so again here.

In the decision below, the panel majority ignored a century of this Court's decisions. The filed tariff doctrine is central to the rate regulation of common carrier industries. It is derived from federal statutory requirements that common carrier services be provided to the public only pursuant to tariffs filed with the relevant federal agency. However, contrary to the well-settled precedents of this Court, and uniform decisions of other courts of appeals, the majority below held that federal tariffs that are statutorily required to be filed do not exclusively define the rights, liabilities, and duties of common carriers in providing regulated telecommunications service. In particular, the court of appeals held that (1) filed tariffs apply only to rates, not to other aspects of the service, and (2) in any event, side agreements can be enforced if they are found to impose additional obligations not contained in the tariffs.

That decision is foreclosed by the decisions of this Court and in conflict with the decisions of every other circuit to address the issue. Further, if allowed to stand, the decision will destroy the national uniformity that is the primary goal of the Communications Act and the many other statutes with identical filed-tariff requirements. Indeed, by enforcing the "side deals" COT alleges in this case, the court of appeals has made COT the beneficiary of the very discrimination that Sections 202 and 203 and the filed tariff doctrine were intended to prohibit.

Summary reversal is appropriate where, as here, "the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Mireles* v. *Waco*, 502 U.S. 9, 15 (1991) (Scalia, J., dissenting)

(*quoting* R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice 281 (6th ed. 1986) (*quoting Schweiker* v. *Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting))). Alternatively, the Court should grant certiorari and order full briefing and argument.

1. The Communications Act, like several other federal regulatory statutes, copied the filed tariff provisions of the 1887 Interstate Commerce Act.[2] In addition to mandating that rates and other terms and conditions of service be reasonable and be provided without unjust discrimination (*e.g.*, 47 U.S.C. §§ 201(b) & 202(a)), the Act requires that "[e]very common carrier" file "schedules" (commonly referred to as "tariffs") that contain all its "charges" and all "classifications, practices, and regulations affecting such charges." *Id.* § 203(a). The Act prohibits rate discrimination by barring a carrier from collecting any "less or different compensation" than "specified" in the tariff or from "refund[ing]" "any portion of th[ose] charges" through any "device." *Id.* § 203(c)(1) & (2). Most pertinently here, the Act also prohibits any carrier from "extend[ing] to any person *any privileges* . . . in such communications," or employing "any classifications, regulations, or practices *affecting such charges*," that are not "specified" in the tariff. *Id.* § 203(c)(3) (emphases added).

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[2] *See* S. Rep. No. 781, 73d Cong., 2d Sess. 2, 4 (1934) & H.R. Rep. No. 1850, 73d Cong., 2d Sess. 4, 5 (1934) ("In this bill many provisions are copied verbatim from the Interstate Commerce Act because they apply directly to communications companies doing a common carrier business, but in some paragraphs the language is simplified and clarified. These variances or departures from the text of the Interstate Commerce Act are made for the purpose of clarification in their application to communications, rather than as a manifestation of congressional intent to attain a different objective."). Thus, this Court has routinely applied filed tariff decisions under the Interstate Commerce Act to the parallel provisions of the Communications Act. *See, e.g., MCI Telecommunications Corp.* v. *American Telephone and Telegraph Co.*, 512 U.S. 218, 229-31 (1994).

These statutory requirements embody what is known as the "filed-rate doctrine" or the "filed-tariff doctrine," which applies "across the spectrum of regulated utilities." *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577 (1981). "The tariff-filing requirement is . . . the heart of the common-carrier section of the Communications Act." *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U.S. 218, 229 (1994) ("MCI"). The filed tariff doctrine serves dual purposes. It prevents unjust discrimination by ensuring that all similarly situated customers are entitled to pay the same tariffed rates, receive the same tariffed service, and have the same federal remedies if the service violates the tariff or the Act's substantive requirements. *See Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 126-31 (1990); *see also MCI*, 512 U.S. at 230. It further operates as a strict rule against use of "parol" evidence and alleged side agreements, thus preventing easily manufactured claims against common carriers, which are *obliged* to provide service in accordance with their tariffs and have no freedom of contract. *Atchison, T. & S.F. Ry.* v. *Robinson*, 233 U.S. 173, 180-81 (1914).

2. A "century" of this Court's decisions hold, contrary to the panel majority, that a federally regulated carrier's filed tariff exclusively "governs the legal relationship between [customer] and carrier," and that "[t]he rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier." *Maislin*, 497 U.S. at 126, 130. These principles were applied, for example, in *Chicago & Alton R.R.* v. *Kirby*, 225 U.S. 155 (1912), one of the many decisions with which the judgment below directly conflicts.

In *Kirby*, a railroad agent had assured a shipper that his racehorses would be sent from Springfield, Illinois to New York City on a particular express train which would arrive in New York at the earliest possible time. The railroad's tariff, however, "did not provide for expedited service, nor for transportation by any particular train."

225 U.S. at 163. The railroad failed to ship the horses by the express train, and the shipper sued. The Court held that the shipper could not enforce this contract against the railroad:

> An advantage accorded by special agreement which affects the value of the service to the shipper and its cost to the carrier should be published in the tariffs, and for a breach of such contract, relief will be denied, because its allowance without such publication is a violation of the act. It is also illegal because it is an undue advantage in that it is not one open to all others in the same situation.

Id. at 165.

The decision below presents, in all relevant respects, the identical legal scenario, but reaches the opposite result. COT alleges that it entered into an agreement with AT&T personnel for expedited service and particularized billing, "an advantage which was not extended to all others," *id.*, and services "not provided for in the published tariffs." *Id.* at 166. The court of appeals nevertheless concluded that such side agreements were enforceable. It offered two rationales: (1) "[b]ecause this case does not involve rates or rate-setting, but rather involves the provisioning of services and billing under several contracts, the filed-rate doctrine does not apply," and (2) the filed tariff doctrine in any event applies only to matters contained in the tariff, and does not prohibit side deals to supplement the tariff. App. 10a, 11a. Both of those rationales are foreclosed by *Kirby* and numerous other cases.[3]

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[3] In a footnote, the majority attempted to distinguish *Kirby* on the grounds that (1) COT claimed that AT&T provided additional, non-tariffed services to others but not to COT, and (2) COT paid the same rates as other customers and AT&T did not seek higher rates. App. 9a. This footnote reflects substantial confusion. First, the contention that a carrier gave superior service to others cannot support a state law claim to enforce an untariffed side deal. Instead, it potentially gives rise to a claim for "unreasonable discrimination"

a. First, the filed tariff doctrine is not limited to rates, but applies to all terms and conditions of service. The Communications Act declares that the tariff filing requirement encompasses "classifications, practices, and regulations affecting" charges, as well as the charges themselves. 47 U.S.C. § 203(a). Both provisioning and billing of SDN, as well as rates and all other terms of service, were thus addressed in AT&T's tariff. *See* App. 21a-22a; 54a-56a. Indeed, the distinction between rates and other terms and conditions of service is meaningless; if a customer receives preferential treatment, it effectively pays a lower rate than other customers, for it receives additional or superior service for the same price.

As the *Kirby* Court thus explained, the parallel provisions of the Interstate Commerce Act forbid not only a carrier's attempt to employ "'any device whatever [to] transport[] at a less *rate* than that named in the tariffs'" but also actions "'whereby any *other* advantage is given or discrimination is practiced.'" 225 U.S. at 155 (quoting Elkins Act of 1903, 32 Stat. 847, c. 708) (emphases added)). The Court therefore held that the filed tariff doctrine barred the agreement for expedited service either because it "affects the value of the service to the shipper and its cost to the carrier" or, even if it did not alter the rate that the carrier should charge, "because it is an undue advantage in that it is not one open to all others in the same situation." *Id.* at 165.

Accordingly, this Court has expressly held that "the filed-rate doctrine is not limited to 'rates' *per se*." *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 966 (1986). "[W]ith respect to the service governed

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in violation of 47 U.S.C. § 202(a)—a claim COT did *not* raise in this case. Second, the fact that COT paid tariffed rates but is seeking additional services does not save its cause of action or distinguish *Kirby* at all. To the contrary, one of the principal reasons for the filed tariff doctrine is to *prevent* the discrimination that occurs when one customer pays the same rates as others while receiving preferential treatment.

by the Federal statute," carriers and customers cannot "alter the terms of the service as fixed by the filed [tariff] regulations," either "with respect to rates" *or* with respect to "any of the services" covered by the tariff. *Southern Ry.* v. *Prescott*, 240 U.S. 632, 638 (1916) (tariff applies to "the entire body of such services"); *see also Boston & Maine R.R. v. Hooker*, 233 U.S. 97, 119 (1914) (tariff applies to anything that "affect[s] the service to be rendered to the passenger").

b. Second, again contrary to the court of appeals' holding, any "side deal" for additional services or preferential treatment not provided for in the tariff is unenforceable. The Act prohibits carriers from affording customers any "privilege" or any "practice[] . . . affecting . . . charges" unless "specified" in the tariff. Thus, the tariff describes the entirety of the legal relationship between the carrier and the customer, and its terms "are conclusive as to the rights of the parties." *Atchison, T & S.F. Ry. Co.* v. *Robinson*, 233 U.S. 173, 180 (1914); *see also Western Union Telegraph Co.* v. *Esteve Bros. & Co.*, 256 U.S. 566, 572 (1921) (the tariff "represent[s] the whole duty and the whole liability of the company. It cannot be varied by agreement").

As the *Kirby* Court explained, the uniform treatment that the statute was designed to ensure "would be defeated if sanction be given to a special contract by which any such advantage is given to a particular shipper as that contracted for by the [railroad]." 225 U.S. at 166. To guarantee a customer, through an extra-tariff agreement, faster and better service than that afforded to others pursuant to the tariff would "give an advantage or preference not open to all and not provided for in the published tariffs," and would therefore necessarily be unlawful. *Id.*

Thus, the decisions of this Court uniformly hold that the filed tariff doctrine prohibits the enforcement under state law of oral or other side agreements to provide expedited service or to provide features of service in partic-

ular ways, whether or not the tariff specifically addresses that subject matter. For example, in *Davis* v. *Cornwell*, 264 U.S. 560 (1924), the Court (per Justice Brandeis) held invalid a carrier's agreement to provide a shipper with a number of railroad cars on a specified day when the tariff did not explicitly address that subject at all. The Court explained that "the assumption by the carrier" of any untariffed "additional obligation was necessarily a preference," for it would permit the customer to sue and recover lost profits for a breach, when similarly situated customers could not get that same recovery. *Id.* at 562. The Court held that, when the tariff is silent on the subject, the only "obligation of the common carrier" with regard to provisioning could be that "implied in the tariff": "to use diligence to provide, upon reasonable notice, cars for loading at the time desired." *Id.* at 561.

These principles have been followed in many subsequent decisions of this Court. *See, e.g., Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 132 (1990) ((permitting parties to alter rates by special agreement "opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish") (quoting *Armour Packing Co.* v. *United States*, 209 U.S. 56, 81 (1908)) and (noting that "[t]his rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination") (quoting *Louisville and Nashville R.R.* v. *Maxwell*, 237 U.S. 95, 97 (1915))); *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (summarily reversing; "the parties are held to the responsibilities imposed by federal law, to the exclusion of all other rules of obligation," and therefore "[a] carrier's claim is, of necessity, predicated on the tariff—not an understanding with the shipper"); *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 582 (1981) ("to permit parties to vary by private agreement the rates filed with

the Commission would undercut the clear purpose of the congressional scheme: granting the Commission an opportunity in every case to judge the reasonableness of the rate").

Ignoring this line of cases, the panel majority held that "even if the [filed tariff] doctrine could apply to other aspects of the SDN service," it "could not apply to any of COT's claims with regard to billing or provisioning" because the jury had been entitled to find that AT&T's tariffs did not cover these matters and that the untariffed agreements filled in "gaps." App. 11a. That is flatly inconsistent with Justice Brandeis's opinion for the Court in *Davis* v. *Cornwell* and the other prior decisions of this Court that squarely hold that statutory filed-tariff requirements would prohibit the imposition of liability on such grounds even if AT&T's tariffs had not addressed these matters (as they unequivocally did). Thus, COT's state-law claims were barred under controlling law because they rest on extra-tariff agreements that concededly cannot be implied in the tariff.

Indeed, the Ninth Circuit's decision was especially improper because, contrary to the panel majority's statements, AT&T's tariff *does* address these matters. It requires only that AT&T attempt with diligence to provision orders by whatever "due date" AT&T establishes, and it also states that AT&T is "not responsible" for billing a reseller's customers. *See* App. 55a, 56a.

In addition, it was entirely improper for the district court to permit the jury to decide—on the basis of "expert testimony"—the legal issue of the tariff's coverage. "Every question of the construction of a tariff is deemed a question of law," *Pan Am. Corp.* v. *Superior Court*, 366 U.S. 656, 666 (1961) (quoting *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 290 (1922)), and must be resolved "uniform[ly]" as a matter of federal law. *United States* v. *Western Pac. R.R.*, 352 U.S. 59, 64 (1956). No other court of appeals has failed to adhere

to this precept,[4] and even the Ninth Circuit has previously recognized that "expert testimony for the purpose of interpreting [a] tariff" is improper. *United States* v. *Atchison, T. & S.F. Ry.*, 725 F.2d 469, 470 (9th Cir. 1980).

3. Not surprisingly in light of the clarity of this Court's decisions, other circuits' decisions uniformly conflict with that of the Ninth Circuit in this case. For example, in *Paulson* v. *Greyhound Lines, Inc.*, 804 F.2d 506 (8th Cir. 1986), the court held that a carrier's alleged oral agreement to deliver a package by a particular time could not be enforced, for *Kirby* and other Supreme Court decisions established "as a matter of law" that a carrier "could not have breached [any] warranty or contract" that purportedly imposed obligations not contained in the tariff. *Id.* at 507-08 & n.5.[5]

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[4] *See, e.g., Durbin Paper Stock Co.* v. *ICC*, 585 F.2d 543, 544 n.4 (D.C. Cir. 1978); *Dunlop Tire & Rubber Corp.* v. *ICC*, 724 F.2d 349, 350 (2d Cir. 1983); *Montgomery Ward and Co.* v. *Roy Stone Transfer Corp.*, 329 F.2d 172, 174 (4th Cir. 1964); *Coca-Cola Co.* v. *Atchison, T. & S.F. Ry.*, 608 F.2d 213, 219-20 (5th Cir. 1979); *Rebel Motor Freight, Inc.* v. *ICC*, 971 F.2d 1288, 1290 (6th Cir. 1992); *Armour & Co.* v. *Chicago, M., St. P. & Pac. R.R.*, 188 F.2d 603, 608 (7th Cir.), *cert. denied*, 342 U.S. 860 (1951); *United States* v. *Great N. Ry.*, 337 F.2d 243, 246 (8th Cir. 1964); *Missouri Pac. R.R.* v. *Independent Mills, Inc.*, 706 F.2d 1080, 1083 (10th Cir. 1983); *United States* v. *Open Bulk Carriers*, 727 F.2d 1061, 1064 (11th Cir. 1984).

[5] In holding that the filed-tariff doctrine applies only to "rates or rate-setting," the panel majority relied on *H.J., Inc.* v. *Northwestern Bell Tel. Co.*, 954 F.2d 485, 488 (8th Cir.), *cert. denied*, 504 U.S. 957 (1992), citing it for the proposition that "[t]he filed-rate doctrine has two purposes: (1) to preserve the regulating agency's authority to determine the reasonableness of rates; and (2) to insure that the regulated entities charge only those rates that the agency has approved or been made aware of as the law may require." App. 10a. The quoted purposes are among the purposes of the filed-rate doctrine, and the Eighth Circuit discussed these in *H.J., Inc.* because the plaintiffs were seeking to challenge the reasonableness of filed rates, *see* 954 F.2d at 486-88, but *H.J., Inc.* did not hold that the doctrine applies only to rates.

Similarly, the Fifth Circuit rejected the panel majority's holding that the filed-rate doctrine applies only to "rates or rate-setting." The Fifth Circuit has squarely concluded that the discrimination that the filed-rate doctrine seeks to prevent "may result" either "from the charging of different rates to different shippers or passengers afforded the same service *or* from the offering of *special services* to only a select patron or group of patrons" *without* raising the rate. *Transcontinental Bus. System, Inc.* v. *CAB*, 383 F.2d 466, 481-82 (5th Cir. 1967) (emphases added, citations omitted), *cert. denied*, 390 U.S. 920 (1968).

The Seventh Circuit also refused to enforce an untariffed agreement that did not apply to rates, but that purportedly required the common carrier to provide transportation service in an agreed-upon manner. *Consumers' Mutual Oil Co.* v. *Schaff*, 59 F.2d 730 (7th Cir. 1932). The Seventh Circuit held that the untariffed agreement was "necessarily void" and stated that "[i]n our judgment this question has been so definitely settled by the Supreme Court that its further discussion by us would be quite superfluous." *Id.* at 731.

4. The decision below will have profound and adverse consequences not only for enforcement of the Communications Act and regulation of the telecommunications industry, but "across the spectrum of regulated utilities" that are governed by the filed tariff doctrine. *See Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577 (1981). Filed tariffs are "the heart of the common-carrier section of the Communications Act" and the "essential characteristic of a rate-regulated industry." *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U.S. 218, 229, 231 (1994). *See also Square D Co.* v. *Niagara Frontier Tariff Bureau*, 476 U.S. 409, 423 (1986) (filed tariff doctrine is "an essential element of the settled legal context"). Congress enacted it in a range of regulatory statutes to assure the national uniformity (*see Keogh* v. *Chicago & Northwestern Ry. Co.*, 260 U.S. 156,

163 (1922)) that is critical to the nondiscriminatory provision of common carrier services in numerous industries, including telecommunications,[6] motor carriage,[7] electric power,[8] natural gas,[9] and railroad transportation.[10] For these reasons, this Court has repeatedly acted to enforce the doctrine where federal agencies or courts have failed to do so—at least three times in the last fifteen years alone. *See, e.g., MCI*, 512 U.S. 218; *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990); *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U.S. 533 (1983).

As the dissent observed, however, the decision below renders the doctrine "an empty letter." App. 20a. Indeed, as Judge Brunetti explained, "regulation of rates divorced from services amounts to no regulation at all." App. 21a. The Ninth Circuit's decision would thus eliminate the national uniformity that the filed tariff doctrine was established to protect, and generate innumerable claims for the very discrimination and special preferences that statutes declare to be unlawful. "If oral agreements of this character can be sustained then the door is open to all manner of special contracts, departing from the schedules and rates filed with the Commission." *Robinson*, 233 U.S. at 181.

When AT&T sought rehearing on these grounds in the court of appeals, COT sought to minimize the significance of the decision by contending that the filed tariff doctrine was no longer of any import.[11] In support of this claim, it cited

[6] *MCI*, 512 U.S. 218.

[7] *Maislin*, 497 U.S. 116.

[8] *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986).

[9] *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981).

[10] *Burlington Northern, Inc.* v. *United States*, 459 U.S. 131 (1982).

[11] COT also sought to defend the panel decision by relying on the provision of AT&T's tariff that does not limit the liability for "willful misconduct." Those claims are both irrelevant and erroneous. First, the Ninth Circuit's decision (properly) did not rely on this ground, and it is thus of no relevance at this stage. Second, in any event, the provision defines AT&T's liabilities for violation of its tariff; it could not lawfully, and does not, permit customers to recover lost profits by claiming that it was "willful misconduct" for AT&T to fail to implement the alleged untariffed side deals that would have given COT an illegitimate preference over similarly-situated customers.

a recent order of the Federal Communications Commission purporting to eliminate the filing of tariffs by some telecommunications carriers in some contexts.[12] That response is insubstantial. The order to which COT referred has not been permitted to become effective, for the Court of Appeals for the District of Columbia Circuit stayed it in response to a challenge to the FCC's authority to adopt it. In all events, the order would apply only to long-distance interexchange (not local exchange) carriers and only to domestic (not international) carriers, and the FCC would also continue to require the filing of tariffs for specified domestic long distance services.[13] Thus even if that order had been permitted to become effective, the filed tariff doctrine would continue to apply at least to the thousands of local exchange carriers that are required to file tariffs for interstate services and all the long distance carriers providing international services, as well as to tariffs filed and services provided pursuant to them before the Order took effect and to tariffs filed in the other industries that the FCC does not regulate. The filed tariff doctrine thus remains a vital part of the law, and it is only the judgment below that threatens to "eviscerate[]" it. App. 22a.

[12] *See Policy and Rules Concerning the Interstate Interexchange Marketplace* (CC Docket No. 96-61), *Second Report and Order*, 11 FCC Rcd. 20730 (1996), *stayed on appeal, MCI Telecomms. Corp.* v. *FCC*, No. 96-1459 (D.C. Cir., Feb. 13, 1997), *recon.*, FCC No. 97-293 (Aug. 20, 1997).

[13] *See id., Second Report and Order*, 11 FCC Rcd. 20730, ¶ 106 (1996).

CONCLUSION

The petition for a writ of certiorari should be granted, and this Court should summarily reverse the decision of the court of appeals, or in the alternative, set the case for briefing and argument.

Respectfully submitted,

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October 16, 1997

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 94-36116, 94-36156
D.C. No. CV-91-1236-JAJ

CENTRAL OFFICE TELEPHONE, INC.,
Plaintiff-Appellee-
Cross-Appellant.

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Defendant-Appellant-
Cross-Appellee.

Appeals from the United States District Court
for the District of Oregon
John A. Jelderks, Magistrate Judge, Presiding

Argued and Submitted
July 8, 1996—Portland, Oregon

Filed February 26, 1997

Before: Warren J. Ferguson and Melvin Brunetti,
Circuit Judges, and Samuel P. King,* District Judge.

Opinion by Judge King; Dissent by Judge Brunetti

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* The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

OPINION

KING, District Judge:

American Telephone & Telegraph Company ("AT&T") appeals the judgment of the magistrate judge, following a three-week jury trial, awarding Central Office Telephone, Inc. ("COT") $1.154 million in damages, and denying AT&T's claim for over $1 million in unpaid federally tariffed charges for long distance services, under the Federal Communications Act of 1934, ("Communications Act" or "Act") 47 U.S.C. § 153(h). COT's action against AT&T alleged breach of contract, breach of implied covenant of good faith and fair dealing, and tortious interference with contract. COT cross-appeals the magistrate judge's decision not to allow the jury to consider an award of punitive damages, as well as the magistrate judge's post-trial order reducing the original jury verdict of $13 million in compensatory damages in favor of COT.

COT, a reseller of long distance services, entered into a contract with AT&T for Software Defined Network ("SDN") services, which COT later resold to its customers. AT&T is a provider of long distance services and is classified as a common carrier under the Communications Act, 47 U.S.C. § 153(h), and therefore, its long distance services are subject to the requirements of § 203 of the Act, which contains statutory filed tariff requirements.[1] 47 U.S.C. § 203.

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[1] Among these are § 203(a)'s requirement that all common carriers (except connecting carriers) file a tariff showing all charges for itself and its connecting carriers' services, and the classifications, practices and regulations affecting such charges with the FCC, and § 203(c)'s prohibitions against charging different rates for services than those named in the filed schedules, and against "extend[ing] to any person any privileges or facilities. . . . or empoly[ing] or enforc[ing] any classifications, regulations, or practices affecting such charges, except as specified in the schedule." 47 U.S.C. § 203(c).

The tariffs filed with the Federal Communications Commission ("FCC") by AT&T set forth the rates for each of its long distance services. One of the services provided by AT&T is SDN, a long distance service which provides a physically separate long distance network for a customer's long distance service. In addition to describing rates for the service, the SDN tariff limits AT&T's liability for all but wilful misconduct.

SDN customers make large volume commitments, and therefore, SDN rates are lower than rates for other AT&T services. Because the set-up of an SDN network is complex, the tariff provides for an up-front installation charge to the customer. Once SDN is set up, the customer may add new locations or drop old ones from the network.

SDN has several characteristics attractive to switchless resellers[2] such as COT. It accommodates switched access, allowing resellers to offer the service to its customers who are generally small businesses or residences. Furthermore, Multilocation Billing ("MLB"),[3] added by AT&T in 1989, allows volume discounts to be apportioned between an SDN customer and individual locations on its network, in a proportion chosen by the customer. Under this opinion, AT&T sends bills directly to the reseller's customers, however, the reseller remains responsible for all payments. Another billing option offered is the Location Account Billing Option ("LABO"), under which

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[2] Switchless resellers are firms that purchase "bulk" long distance services from carriers and resell them to their own customers. They qualify for volume discount plans by aggregating the business of multiple customers who would not individually qualify for volume discounts. The reseller is the customer of AT&T and the end users are the customers of the reseller.

[3] AT&T contends that MLB is a tariffed service. However, in ruling on AT&T's motion for judgment as a matter of law, the magistrate judge held that "[MLB], a subject of considerable contention in this dispute, is an untariffed service that is subject to a separate agreement between the parties."

AT&T sends bills to each location at the discount rate, and each location is responsible for payment.

AT&T also instituted two tariffed pricing promotions in 1989 which are attractive to resellers. Expanded Volume Pricing plans ("EVPs"), offering additional discounts from the basic SDN rates for customers making large usage and duration commitments, and another promotion which waived the installation charges and per-location installation charges for customers making multi-year commitments, subject to penalties for early termination.

Following the 1989 changes in SDN service, orders from resellers increased, and AT&T experienced delays in provisioning SDN, especially switched access service. Billing problems also occurred, most notably, "suppressed billing"[4] which resulted in customers not receiving bills for calls for up to one year after the calls were made.[5]

In light of the problems with SDN, AT&T limited the number of new SDN customers. AT&T also transferred servicing of all reseller customers to the Channel Development and Operations Center ("CDOC").[6] The CDOC was the successor to the Carrier Service Center, which had previously done business with AT&T's reseller customers.

COT placed orders for SDN, after COT's president became aware of SDN in 1989, and contacted AT&T's Portland office regarding the service. On October 30, 1989, COT signed an agreement for SDN service, and selected

[4] Suppressed billing occurs when a location is on the SDN network but does not have a "billing guide" in place to match its phone usage billing record. The billing system therefore has nowhere to register the call and the calls are lumped into a "unbilled" toll group until the billing guide is set up. Once the guide is set up, the customer is billed for past unbilled calls.

[5] COT was still experiencing billing problems in 1992 when it filed suit.

[6] The CDOC has two locations, one in Pleasanton, California, the other in Piscataway, New Jersey.

Multi Location Billing. AT&T represented to COT that the service would be provisioned in four to five months, and thereafter, additional orders within 30 days. In February, AT&T advised COT that new orders would take 45 to 90 days due to provisioning problems, and informed COT that another AT&T service, Multi Location Calling Plan ("MLCP") would service COT's customers until they were provisioned onto SDN.

COT began reselling SDN services in April 1990, and immediately experienced problems with the network including provisioning delays and suppressed billing. COT also experienced an additional billing problem; COT's customers received 100% of the discount instead of the 50% COT had selected, because COT was billed under the LABO billing option rather than the MLB billing COT had selected. COT continued to experience problems with provisioning and billing, and in October 1990 COT switched from MLB billing to Network Billing, under which AT&T sent COT a single bill which COT was responsible for paying. COT then sent individual bills to its customers.

Although COT continued to sell SDN, it was ultimately unable to meet its usage commitment for the first period in which it was applicable. In addition, AT&T claimed that COT had failed to pay nearly $200,000 in bills from the period in which COT was under MLB billing. On September 21, 1992, COT's president informed AT&T that COT was terminating its contract as of September 30, 1992, with 1½ years remaining in the contract.

COT filed suit on November 27, 1991. COT ultimately pursued three state law claims at trial: breach of contract, breach of implied covenant of good faith and fair dealing, and tortious interference with contract.[7] COT's state law

[7] Because the magistrate judge treated the first two claims as one breach of contract claim, COT states that only two claims were before the jury.

claims were based on COT's allegation that the contracts entered into with AT&T did not constitute the ordering of long distance pursuant to the requirements of AT&T's tariff, but rather constituted voluntary contracts in which COT agreed to purchase, and AT&T agreed to provide long distance services. COT also claimed that the contracts encompassed more than the written orders, and included all the understandings that COT's president had from reading service brochures and from talking with AT&T representatives.

COT argued that AT&T's failure to provision SDN orders in a reasonable manner, failure to properly allocate discounts between COT and its customers under Multilocation Billing, failure to offer SDN and MLCP services which were functional for COT, failure to initially credit MLCP usage to SDN, failure to provide timely call detail to COT and its customers, and failure to afford COT international calling capability at a reasonable completion rate, as well as a requirement that COT post a deposit, and AT&T's provisioning of calling card capabilities under Network Remote Features rather than an SDN calling card bearing both COT's and AT&T's logo, constituted breach of contract.

COT also claimed that AT&T breached its state law implied duty of good faith and fair dealing by taking actions that undermined the purpose of the contract, which was to obtain services, and resell them at a profit. COT's tortious interference with contract claim alleged that because COT had promised certain benefits of SDN to its customers, and because AT&T provided competing services, any violation of AT&T's contractual duties constituted tortious interference with COT's relationship with its customers.

Furthermore, COT alleged that AT&T's conduct was wilful and therefore consequential damages could be awarded under the terms of its tariff. COT claimed the wilful conduct consisted of running a promotion for SDN

when AT&T did not have the capability to provision COT and other resellers to the CDOC. COT also argued that improper purpose could be inferred from certain internal AT&T documents discussing proposed SDN changes.

At three stages of the proceedings below,[8] AT&T asserted that COT's state law contract and tort claims were preempted by the filed tariff doctrine of § 203 of the Communications Act. The magistrate judge rejected this claim and denied AT&T's Motion for Summary Judgment as to its counterclaim and all of COT's claims, excepting COT's negligent misrepresentation claim. *Central Office Tel. Co., Inc. v. AT&T*, Civ. No. 91-1236-JE (E.D. Or. 1991). In denying AT&T's motion for summary judgment on its counterclaim and on COT's claim for breach of contract, the magistrate judge found AT&T's reading of the filed-rate doctrine too broad. The magistrate judge also found that because COT was not disputing the filed-rate's reasonableness or validity, or that of the tariff in general, but rather was complaining about the manner in which AT&T provided the services for which COT contracted, the field-rate doctrine did not apply. *Id.* at 16.

The magistrate judge also rejected AT&T's argument that there was no substantial evidence that any of its chal-

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[8] Before trial, AT&T moved for partial summary judgment on its counter-claim for unpaid tariffed charges, and for summary judgment on the then remaining seven state law claims made by COT in its Amended and Supplemental Complaint. COT disputes that AT&T specifically raised the issue of preemption. However, AT&T did argue that "the filed tariff doctrine requires entry of judgment in favor of a carrier, even though its customer has state law claims related to the reasonableness of the tariff rates or charges." Def. Mot. in Supp. of Mot. for Summ. Jmt. at 22. After trial, AT&T moved for a directed verdict on COT's breach of contract and breach of implied covenant claims, arguing, *inter alia*, that COT's state law contract claims were barred by the filed tariff doctrine and preempted by the Communications Act. AT&T's Mem. in Supp. of Mot. for Directed Verdict. AT&T reiterated this argument in its Motion For Judgment as a Matter of Law following the jury verdict.

lenged conduct constituted wilful misconduct within the meaning of its tariff. In addition, AT&T moved to exclude a lost profits study prepared by COT's damage expert, which motion was denied. COT requested that it be allowed to present evidence of AT&T's financial condition in support of its claim for punitive damages, however, the court also denied this request.

The jury returned a verdict of $13 million in favor of COT on its breach of contract and intentional interference claims, and also in favor of COT on AT&T's counter-claim for unpaid tariff charges. Judgment was entered on July 1, 1994. AT&T then moved for judgment as a matter of law, for a new trial or for remittitur. The court denied AT&T's motions for new trial and remittitur, and ruled as a matter of law that the filed-rate doctrine did not preempt COT's claims. The magistrate judge also granted AT&T partial judgment as a matter of law and cut-off COT's damages for the period after September 1992, finding there was no competent evidence for this period. The magistrate judge then entered an amended judgment awarding COT $1,154,000. COT moved, pursuant to Fed. R. Civ. P. 59(c), to alter the amended judgment on the grounds that the court had relied on the wrong exhibit when it calculated pre-September damages. The court denied the motion.

On appeal, AT&T reiterates its contention that COT's state law claims are preempted by the Communications Act. COT counters that AT&T failed to provide untariffed services and engaged in wilful misconduct, and therefore, the filed-rate doctrine does not apply and its claims are not preempted. Therefore, it must initially be determined whether the magistrate judge was correct in holding as a matter of law that the filed-rate doctrine did not apply to COT's claims. We review a district court's decision regarding motions for judgment as a matter of law pursuant to Fed. R. Civ. P. 50 de novo. *Montiel v. City of Los Angeles*, 2 F.3d 335, 342 (9th Cir. 1993).

AT&T argues that statutory filed tariff requirements preempt any state law claims that a carrier has expressly or impliedly agreed to provide a customer with services that are better or different from that required by the carrier's filed tariffs. Under 47 U.S.C. § 203 (a), communications common carriers must file tariffs with the FCC. The tariff-filing requirements were taken from the Interstate Commerce Act ("ICA"), and the Supreme Court has stated that, like rate-filing under the ICA, tariff-filing under the Communications Act is "Congress's chosen means of preventing unreasonableness and discrimination in charges; . . . the tariff-filing requirement is the heart of the common-carrier section of the Communications Act." *MCI v. AT&T*, —— U.S. ——, 114 S. Ct. 2223, 2231 (1994). The filed tariff doctrine (or filed-rate doctrine) forbids a regulated entity from charging rates for its services other than those filed with the appropriate regulatory authority. *Arkansas Louisiana Gas, Co. v. Hall*, 453 U.S. 571, 577 (1981). The filed-rate of the carrier is the only lawful rate a carrier may charge, and it is strictly construed. *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 127 (1990) (interpreting the filed-rate provisions of the ICA); *MCI*, 114 S. Ct. at 231. Furthermore, "the filed-rate governs the legal relationship between the shipper and the carrier." *Maislin*, 497 U.S. at 126.

AT&T argues that a long line of Supreme Court Cases establish that the filed-rate doctrine precludes a carrier from entering into "side-deals" which give preference to certain customers and are not defined in the filed-rates.[9]

[9] AT&T cites several cases in support of this argument including: *Chicago & Alton R.R. v. Kirby*, 225 U.S. 155 (1912) (holding a contract between a carrier and a shipper, under which the shipper guaranteed racehorses would be shipped on certain train, invalid because it was not published in the tariffs and gave one shipper an advantage not available to all), *Davis v. Cornwell*, 264 U.S. 560 (1924) (holding agreement to provide a shipper a number of railroad cars on a specified day invalid because the tariff did not provide

COT argues that AT&T's cases establish that a carrier may not provide special or extra services to certain customers that are not defined in the tariffs, such that the customer actually pays a lower rate. Furthermore, COT argues that it paid the same rates as AT&T's corporate customers and that its claims do not involve the tariff rates.

The filed-rate doctrine has two purposes: (1) to preserve the regulating agency's authority to determine the reasonableness of rates; and (2) to insure that the regulated entities charge only those rates that the agency has approved or been made aware of as the law may require. *H.J., Inc. v. Northwestern Bell Telephone Co.*, 954 F.2d 485, 488 (8th Cir.), *cert. denied*, 504 U.S. 957 (1992). Because this case does not involve rates or rate-setting, but rather involves the provisioning of services and billing under several contracts, the filed-rate doctrine does not apply.[10]

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for specification of shipping date); *Atchison v. T. & S.F. Ry. v. Robinson*, 233 U.S. 173 (1914) (holding an agreement to provide expedited shipping not enforceable because it was not contained in carrier's tariff). As pointed out by COT and stated explicitly in *Chicago*, the agreements cited in these cases were for special expedited shipping services for which the customer would have been expected to pay a higher rate. The Court thus found that the special service should have been included in the tariff and made available to all. 255 U.S. at 165. COT contends that AT&T provided special services to others, but denied them to COT. There is no allegation by either AT&T or COT that COT did not pay the same rates as others who sought the same services from AT&T, nor does AT&T contend that COT should have paid higher rates than those in the tariffs.

[10] In *Wegonland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 19 (2d Cir. 1994), the Second Circuit noted that there are two corresponding interests involved with the filed-rate doctrine which have turned up in Supreme Court decisions: the justiciability of determining reasonable rates, and the potential discrimination in rates between ratepayers. Both of these interests involve the payment of rates and do not refer to contractual obligations to provide services as AT&T contends. AT&T argues that the filed-rate doctrine does not only

However, assuming arguendo, that COT's claims are covered by the filed-rate doctrine, the filed-rate doctrine could not apply to any of COT's claims with regard to billing or provisioning. As noted by the magistrate judge, Multi Location Billing, the option originally chosen by COT, was not covered by the tariff. AT&T's tariff expert testified at trial that billing procedures were not covered by AT&T's tariffs. In addition, the mutually agreed upon facts given in the jury instructions state that COT chose MLB, and that it was not covered by the tariff. Furthermore, AT&T's tariff expert also testified at trial that the provisioning of SDN services was not covered by the tariff. Therefore, the filed-rate doctrine could not apply to any of COT's claims with regard to billing or provisioning, even if the doctrine could apply to other aspects of the SDN service.[11]

Having determined that COT's claims are not preempted by the filed-rate doctrine, it follows that the magistrate judge was not in error, as AT&T asserts, by failing to instruct the jury that the only issue was whether AT&T violated its tariff through wilful misconduct. Likewise, the magistrate judge did not err in denying AT&T's motion

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apply to rates, citing *Western Union Telegraph Co. v. Esteve Bros. & Co.*, 256 U.S. 566, 571-72 (1921). This case in fact involved two classes of rates. Messages sent at the lower rate were sent only once and provided for limited liability for messages not received. The other, was more expensive and provided that messages would be repeated. The court found that the limitation of liability was part of the rate because the customer accepted the risk of the message being wrongly transmitted by choosing the cheaper rate and having the message sent only once. The Court further found that allowing recovery of damages to those who chose a lower rate would create a preference over those who paid the higher rate to insure their message was transmitted correctly. *Id.*

[11] In addition, AT&T's expert testified that the provisions of the tariffs do not apply to the relationship of AT&T to the reseller, but rather, only apply to the relationship between AT&T and the end user.

for judgment as a matter of law for unpaid tariff charges owed by COT. AT&T maintains that the same errors of law which applied to its argument that COT's state law and contract claims were preempted by the filed-tariff doctrine require the reversal of the denial of its counterclaim. Previously, AT&T had argued that the filed-rate doctrine barred the application of equitable defenses against the collection of debts incurred pursuant to a tariff filed with the appropriate agency. *Maislin*, 497 U.S. 116 (1990).

The magistrate judge, however, found that COT was not disputing the validity of the rates charged under the tariff, but rather, the accuracy of AT&T's calculations and AT&T's right to collect for services for which COT's customers were not accurately billed. Once again, AT&T bases its argument on the assumption that all rights between AT&T and COT are governed by the tariff. As already discussed, this is not the case.

COT argues that AT&T failed to provide the services it was promised, including correct billing.[12] COT also argues that the jury rejected the counterclaim based on the evidence it presented including testimony that COT paid all amounts owed for SDN service, as reflected in COT's records, that approximately $130,000 of alleged unpaid tolls resulted from incorrect AT&T billings and another $68,000-69,000 from unexplained charges, and evidence that AT&T's billing was flawed and showed wild fluctuations. Given that AT&T cannot rely on its filed-rate tariff argument to shield itself from COT's claims and that the evidence presented by COT suggests that AT&T did not properly bill COT, it was not error for the magistrate judge to deny AT&T's motion for judgment as a matter of law on its counterclaim.

[12] The parties do not dispute that COT paid all charges owed after it took over billing for itself, following AT&T's inability to correctly bill COT's customers as promised.

In addition, AT&T maintains, as it did both during and after trial, that COT's failure to produce any competent evidence of damages is independent ground for reversal of the amended judgment, and that because the testimony of COT's damage expert should not have been admitted, the $1.154 million award should be reversed and judgment entered for AT&T.

Evidentiary rulings are reviewed for an abuse of discretion, and should not be reversed absent some prejudice. *City of Long Beach v. Standard Oil Co.*, 46 F.3d 929, 936 (9th Cir. 1995); *The Monotype Corp. v. Int'l Typeface Corp.*, 43 F.3d 443, 448 (9th Cir. 1994).[13]

Initially, the parties disagree over whether state or federal law should apply when determining whether the evidence supports a claim for lost profits. AT&T argues that federal law should apply citing a Fifth Circuit case for this proposition, *University Computing Co. v. Management Science*, 810 F.2d 1395 (5th Cir. 1987). However, in *University Computing*, the court found that federal law determined the sufficiency of the evidence with reference to state substantive law on lost profits. *Id.* at 1396. In *Milgrad Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703 (9th Cir. 1990), the defendant challenged damage awards as speculative and unsupported by the evidence. *Id.* at 710. This Court stated that the determination of damages was a question of fact which will not be disturbed unless it is clearly unsupported by the evidence. *Id.* The Court then laid out the test for lost profits under Washington State Law. *Id.*

Oregon law states that the essential ingredient of proof of lost profits to a reasonable certainty is supporting data.

[13] AT&T asserts that the proper standard is de novo review, citing *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311 (9th Cir.), *cert. denied*, 116 S. Ct. 189 (1995). However, the de novo standard enunciated in *Daubert* applies to scientific evidence under Fed. R. Evid. 702 and there is no indication that the standard is meant to apply to all expert testimony.

Hardwick v. Dravo Equip. Co., 569 P.2d 588, 591 (Or. 1977). Expert testimony alone can provide a sufficient factual basis for an award of lost profits. *Milgrad*, 902 at 711.

After reviewing in detail the method used by COT's expert to calculate lost profits, the magistrate judge, in his order denying in part and granting in part AT&T's motion for judgment as a matter of law, found that COT was not entitled to recover damages for the period following the termination of its contract with AT&T. However, he found that COT's damage expert's study was "sufficiently grounded in objectively verifiable facts and reasonable assumptions to support the jury's award of lost past profits up to COT termination of its SDN sales in September 1992." Thus referring to the standard for lost profits enunciated by the Oregon Supreme Court, the magistrate judge did not abuse his discretion by allowing the testimony to go to the jury.

Additionally, COT makes several arguments concerning the errors made by the magistrate judge in limiting its damage award. First COT argues that under Oregon Law, lost profits may be recovered for tort as well as contract actions, and therefore, the magistrate judge erred in limiting the damages to the contract period. The magistrate judge, however, limited the damage award to the contract period because he found that determining damages beyond that period was too speculative, not because he found that damages should only encompass the term of the contract. In reviewing the size of jury verdicts, the proper role of trial and appellate courts in the federal system is a matter of federal law. *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649 (1977) (per curiam). The district court determines whether the jury's verdict is within the confines of state law. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disp., Inc*, 492 U.S. 257, 279 (1989). Under Oregon law lost profits damages must be proven

to a reasonable certainty. *Welch v. Bancorp Realty and Mortgage Trust*, 596 P.2d 947, 964 (Or. 1979); *Hardwick v. Dravo Equip. Co.*, 569 P.2d 588, 591 (Or. 1977). An essential ingredient of proof of lost profits to a reasonable certainty is supporting data. *Hardwick*, 569 P.2d at 591.

COT contends that the magistrate judge improperly applied an absolute certainty test when he determined that COT's expert's testimony was insufficient because he did not know the number of salespeople COT employed after 1990, and because he based his projections on 10 salespeople when in fact COT employed only four. Although the magistrate judge found no evidence to support this opinion, COT argues that it was supported by COT's president who testified that he intended to hire two more salespeople and to open additional offices in each. However, COT points to no evidence which indicates these plans would have come to fruition had COT not terminated its contract with AT&T.[14] Therefore, it cannot be said that the magistrate judge applied an absolute certainty standard by finding that experts must have some verifiable basis for their opinion.

COT also maintains that the magistrate judge impermissibly reweighed the evidence when he found fault with the expert's failure to make specific allowance for bad debts and failure to account for the effect of technological changes. Although it is true that the court should not reweigh the evidence, *Garvin v. Greenback*, 856 F.2d 1392, 1396 (9th cir. 1988), the court must still view the evidence in the light most favorable to the non-moving party to determine if the verdict is supported by substantial evi-

[14] COT points to *Hardwick* for the proposition that lost profits calculations which project additional employees for the damages period meet the substantial certainty test. 569 P.2d at 591. However, in *Hardwick*, the additional projected employees were based on the number of people that plaintiff would have needed if the log loader at issue in the breach of contract case had not been defective.

dence. *Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1151 (9th Cir. 1988). As to both of these factors, the magistrate judge could find no basis for the expert's opinions other than the expert's own assumptions.[15]

Other problems identified by the magistrate judge included, the expert's failure to account for the fact that COT intended to do its own billing in the future, the expert's assumptions that the discount levels would remain constant through the year 2000, his failure to talk to any customers or provide for possible competition, and his failure to research similar services provided by other companies before declaring SDN to be a unique product. This latter point, the magistrate judge stated, was very significant because a reseller can recover profits lost by a supplier's failure to deliver if no substitute can be found.[16] Relatedly, the magistrate judge found that the expert had considered all profits that COT might have realized through selling SDN as lost, without accounting for increased effort and sales of services provided by AT&T competitors.

Finally, the magistrate judge found that COT's expert failed to take into account that the problems COT encountered with AT&T's SDN services would have continued throughout the contract period and into the future. The magistrate judge therefore held that the expert testimony was not sufficient to support seven years of lost profits recovery.

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[15] COT argues that AT&T's own witness testified that COT would remain viable until 1998. However, although this testimony may have been offered to the jury, the future technological status of SDN was not included by the expert in his forecast of lost profits, and is a different issue entirely.

[16] For this proposition, the magistrate judge cited *Calbag Metals Co. v. Atkinson Co.*, 770 P.2d 600, 602-03 (Or. 1989); *United Engine Parts Co. v. Reid*, 584 P.2d 275 (1978); *Consolidated Data Terminals v. Applied Digital Data Sys.*, 708 F.2d 385, 394-95 (9th Cir. 1983).

Given the myriad of flaws identified by the magistrate judge, it does not appear that, even viewing the evidence in the light most favorable to COT, AT&T was not entitled to judgment as a matter of law on the post-contract claim.

In the alternative, COT argues that if this Court finds that the jury verdict was not supported by substantial evidence, the district court must nevertheless be reversed because the magistrate judge improperly reduced the jury award in violation of th Seventh Amendment. The Seventh Amendment controls the allocation of authority to review verdicts in federal courts. *Gasperini v. Center for Humanities, Inc.*, —— U.S. —— 116 S.Ct. 2211 (1996). The Supreme Court has held that the re-examination clause of the amendment does not inhibit the power of the trial judge to grant new trials or to order remittitur. *Gasperini*, 116 S. Ct. at 2222.

Upon motion for a new trial, a trial court, finding a verdict excessive may either order a new trial or deny the motion conditional on the party accepting a remittitur. *Fenner v. Dependable Trucking Co., Inc.*, 716 F.2d 598, 603 (9th Cir. 1983). COT argues that it should have been given this option before the jury's award was reduced. However, the magistrate judge did not reduce the award upon AT&T's motion for a new trial, but rather upon their motion for judgment as a matter of law. Rule 50 of the Federal Rules of Civil Procedure allows a court to set aside the verdict of the jury and enter judgment as a matter of law, and has been held to be constitutionally compatible with the Seventh Amendment. *Gasperini*, 116 S.Ct. at 2224 n.20; Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure*, § 2522, pp. 241-42 (2d ed. 1995). The magistrate judge's action under Rule 50 does not appear to be in conflict with the Seventh Amendment.

Furthermore, COT also argues that the magistrate judge improperly granted judgment as a matter of law

based on a truncated trial record. COT asserts that it is reversible error for a district court to admit an expert's lost profit evidence at trial then, after eliminating the expert's evidence post-trial, and to grant judgment as a matter of law. *See Midcontinent Broadcasting Co. v. North Central Airlines, Inc.*, 471 F.2d 357, 358-59 (8th Cir. 1973) (holding same). Although it is true, as COT states, that a trial judge must consider all the evidence submitted in ruling on a motion for judgment as a matter of law, contrary to COT's position, the magistrate judge did not only consider a portion of the evidence submitted to the jury. Instead, the magistrate judge considered the entirety of the testimony of COT's expert, found that he should not have allowed the post-contract period evidence to be submitted, then reduced the jury's damage award. Therefore, COT's argument on this issue is misplaced.

The final issue on appeal concerns COT's punitive damage request. COT argues that, under Oregon law, when a plaintiff establishes a prima facie case of intentional interference with business relations, the plaintiff is entitled to present evidence of the defendant's financial condition in support of its claim for punitive damages. Or. Rev. Stat. 41.315. COT asserts that it presented a prima facie case of intentional interference with business relationships, survived AT&T's motion for judgment as a matter of law and convinced the jury that AT&T was an intentional tortfeasor, and therefore the magistrate judge erred in withholding its punitive damage claim from the jury.

Whether to award punitive damages is a question of state law and is, therefore, reviewed de novo. *Mapes v. United States*, 15 F.3d 138, 140 (9th Cir. 1994). This Court must apply Oregon's law as the Oregon Supreme Court would apply it. *Intel Corp. v. Hartford Accident & Idem. Co.*, 952 F.2d 1551, 1556 (9th Cir. 1991). Under Oregon Law, punitive damages are available when

there is evidence of malicious or wanton conduct.[17] *Van Lom v. Schneiderian*, 210 P.2d 468 (Or. 1949). When punitive damages are sought, the judge determines whether there is evidence of malice as a matter of law, and if he decides there is, the assessment of damages is committed to the jury's discretion. *Van Lom*, 210 P.2d at 469. This court has determined that punitive damages may be awarded under Oregon State law for the tort of tortious interference with an economic relationship, *Kraus v. Santa Fe Southern Pac. Corp.*, 878 F.2d 1193 (9th Cir. 1989), *cert. dismissed*, 493 U.S. 1051 (1990), and Oregon courts have held that punitive damages may be awarded for tortious interference with a business relationship if actual damages are awarded on the same claim. *Employees Fire Ins. Co. v. Love It Ice Cream Co.*, 670 P.2d 160 (Or. App. 1982) (citing *Belleville v. Davis*, 498 P.2d 844 (1972)).

COT argues that, having prevailed on its claim for tortious interference with contract, the magistrate judge erred in not instructing the jury on punitive damages. In denying COT's instruction on punitive damages and not allowing COT to introduce evidence of AT&T's financial condition, the magistrate judge noted his concerns over prejudicing the jury. However, because this Court conducts de novo review on this issue, and in light of the jury verdict in this case, it appears that the punitive damage instruction should have not been given. The Oregon Supreme Court has held that when an error affects only the availability and amount of punitive damages, it is appropriate to remand that case for trial on those issues. *Honeywell v. Sterling Furniture Co.*, 797 P.2d 1019, 1023 (Or. 1990). Therefore, it is appropriate to remand

[17] The Oregon Supreme Court has sanctioned the award of punitive damages "whenever there was evidence of a wrongful act done intentionally, with knowledge that it would cause harm to a particular person or persons." *McElwain v. Georgia-Pacific Co.*, 421 P.2d 957 (Or. 1966).

the case for a new trial on the issue of punitive damages.

For the foregoing reasons, the magistrate judge's post-trial judgments are affirmed. However, his decision not to submit punitive damages evidence to the jury is reversed, and the case remanded on the issue of punitive damages.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

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BRUNETTI, Circuit Judge, dissenting:

I dissent because I believe that the filed-rate doctrine preempts COT's state-law claims. I would reverse the magistrate judge's legal conclusion that the doctrine does not do so and mandate that the court dismiss COT's pre-empted state-law claims.

The majority concludes that the filed-rate doctrine does not preempt COT's claims because: (a) the case involves the provisioning of services rather than rate-setting; or alternatively, (b) the services at issue were not covered by the tariff. Both proffered reasons misinterpret the filed-rate doctrine.

A. *Both Rates and Corresponding Services Are Covered by the Filed-Rate Doctrine.*

To avoid being an empty letter, the filed-rate doctrine must encompass both rates and the services corresponding to those rates. The opinion erroneously narrows the scope of the doctrine by stating that "[b]ecause this case does not involve rates or rate-setting, but rather involves the provisioning of services and billing under several contracts, the filed-rate doctrine does not apply."

The Communications Act provides that "[e]very common carrier . . . shall . . . file with the Commission and print and keep open for public inspection schedules showing all charges . . . and showing the classifications,

practices, and regulations affecting such charges." 47 U.S.C. § 203(a). The plain language of the statute mandates that tariffs include both rates and underlying services. Limiting the filed-rate doctrine to the rate-setting portion of the tariff undermines the goal which Congress expressed in section 203(a): the provision of rates and services in a nondiscriminatory manner.

In its most recent examination of this issue, the Supreme Court repeatedly stressed section 203(a)'s importance: "[t]he tariff-filing requirement is . . . the heart of the common-carrier section of the Communications Act." *MCI v. AT&T*, 514 U.S. 218, 114 S. Ct. 2223, 2231 (1994). "[R]ate filing was Congress's chosen means of preventing unreasonableness and discrimination in charges. . . ." *Id.* "Rate filings are, in fact, the essential characteristic of a rate-regulated industry." *Id.* at 2232.

Although the majority's interpretation would hold otherwise, rates have no meaning unless tied to corresponding services. Yet the majority argues that only the rate portions of the tariff are subject to preemption. Extending this analysis, carriers would be bound only to those rates and not to the corresponding services. If this were so, carriers could easily devise schemes to avoid the Communications Act's fairness requirements. In truth, regulation of rates divorced from services amounts to no regulation at all. For the requirements of the Communications Act to possess any import, both the rates and corresponding services must be covered by the filed-rate doctrine.

An examination of the tariff at issue illustrates this point. AT&T's tariff prescribes not only the rates for various types of services, but also AT&T's rights and liabilities in each of the areas in which COT claims that AT&T breached its obligations. These include: provisioning orders, billing, providing calling cards, requiring deposits and providing the long distance service itself. *See*,

e.g., AT&T Tariff F.C.C. No. 1, § 2.5.10 (provisioning), § 6.2.4 (billing), § 2.5.12.B (calling card), § 2.5.6 (deposits), § 6.2.5 (service support). The service specifics are clearly delineated in the tariff itself.

It is both counterintuitive and inconsistent with the traditional importance of the Communications Act to suppose that the filed-rate doctrine would encompass the rates in the tariff, but not the services contained in the same document. *See MCI*, 114 S. Ct. at 2226-28 (detailing historical importance of Communications Act). To hold that anything less than all material aspects of the provided services are covered by the tariff eviscerates the "heart" of the Communications Act.

B. *Because the Services at Issue Were Not Covered by the Tariff, COT's Claims Are Preempted.*

The majority also concludes that the filed-rate doctrine does not preempt COT's claims because the tariff did not cover the services at issue. Although they are correct in asserting that the services were not in the tariff, it is precisely for this reason that COT's claims are preempted. AT&T is simply barred from contracting for non-tariffed services. To analyze this transaction it is necessary to examine both the filed-rate doctrine and the specific tariff at issue.

In its most general terms, a filed tariff controls the legal relationship between a long-distance carrier and its customers. *See Maislin Indus. v. Primary Steel, Inc.*, 497 U.S. 116, 126 (1990) ("This Court has long understood that the filed rate governs the legal relationship between shipper and carrier."). As the authorities cited by the majority acknowledge, AT&T is not allowed to provide services without filing a tariff setting the rate and all "classifications, practices, and regulations" corresponding to the rate. Furthermore, "[t]he rights as defined by the tariff cannot be varied or enlarged by either contract or

tort of the carrier . . . ." *Id.* (quoting *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156, 163 (1922). If AT&T could simply contract for untariffed services, it would never have to file a tariff in the first place and the filed-rate doctrine would be rendered meaningless.

However, COT argues, and the majority agrees, that AT&T entered into an enforceable contract for services which were not covered by the tariff. This argument misreads the filed-rate doctrine, which expressly prohibits a carrier from contracting for services not covered by the published tariff.

Chicago & Alton R.R. v. Kirby, 225 U.S. 155 (1912), a case the majority addresses in a footnote, illustrates the operation of the doctrine. (Majority Opinion, footnote number 9). In *Kirby*, a carrier contracted with a shipper to deliver cargo on a expedited basis. When the carrier failed to perform, the shipper sued for breach of contract. The Supreme Court held that the contract was invalid under the filed-rate doctrine because the carrier's tariffs "did not provide for an expedited service, nor for transportation by any particular train" and gave "an advantage or preference not open to all and not provided for in the published tariffs." *Id.* 163-66. *See also Davis v. Cornwell*, 264 U.S. 560 (1924), *Atchison, T. & S.F. Ry. v. Robinson*, 233 U.S. 173 (1914).

The majority attempts to distinguish *Kirby* and its progeny by reasoning that COT is not seeking to obtain for the tariffed rate extra services not covered in the tariff, but is merely seeking the same services provided to AT&T's other customers. This is incorrect. COT is seeking services that are not covered in the tariff at the tariffed rate.

The majority also argues that COT's claims are not preempted because MLB, the option originally chosen by COT, was not covered by the tariff. Although the magistrate judge ruled that MLB was not a tariffed service, that

decision is irrelevant to the result here. If the majority and the magistrate judge correctly identify MLB as a non-tariffed service, then *Kirby* dictates that AT&T was prohibited from entering into that agreement and it is now invalid. If, as AT&T claims, MLB was a tariffed service, then the filed-rate doctrine prohibits COT's state law claims. In either case, COT has no state-law claims against AT&T for MLB service.

The majority utilizes AT&T's expert testimony to conclude that neither the billing procedures nor the provision of SDN services were covered by the tariff. Again, this is of no import. If those service were not covered by the tariff, the agreements were invalid and COT cannot now attempt to enforce them. If they were tariffed, they are preempted by the filed-rate doctrine.

While the filed-rate doctrine may create harsh consequences in some instances, the Supreme Court has consistently adhered to it because of the overarching policy of the Act, namely, prevention of discrimination. *See Maislin*, 497 U.S. at 128. Accordingly, a court is required to ignore allegations of fraud or other inequitable conduct in determining whether to apply the doctrine. "Rather, the focus for determining whether the filed rate doctrine applies is the impact the court's decision will have on agency procedures and rate determinations." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 954 F.2d 485, 489 (8th Cir.), *cert. denied*, 504 U.S. 957 (1992). An examination of the filed tariff at issue, AT&T Tariff F.C.C. No. 1, proves instructive for this purpose.

Initially, the tariff sets forth the provisioning standards for establishing and confirming a due date when an order for SDN service is placed. In addition, AT&T must "make every reasonable effort to assure" that it is delivered on time, but if there is a delay in excess of 45 days, "the Customer may cancel the order without penalty or payment or nonrecurring charges." (§ 2.5.10.B). Under the

tariff, the customer is responsible for payment of bills, except for the Location Account Billing Option, to which COT did not subscribe. For that option, AT&T "is not responsible for the way the Customer may allocate usage or charges among multiple Users." (§ 6.2.4).

For calling cards, the tariff provides that "[c]alls charged to a Local Exchange Company Calling Card or an AT&T Card will . . . be included on the LDMTS bill for the Main Billed Account with which the card is associated." (§ 2.5.12.B). The tariff also delineates deposit provisions for customers who have a "proven history of late payments . . . or whose financial responsibility is not a matter of record." It requires those customers to "make a deposit to be held as a guarantee for the payment of charges." (§ 2.5.6.A).

The tariff's service provision states that "Custom Network Services are fully supported by the Company through engineering, installation and maintenance efforts. The Company will assure that each service functions properly within its specified transmission and switching parameters." (§ 6.2.5). "When installation of a component is required it will be installed subject to the availability of installation personnel and equipment." (§ 6.2.5.B).

As these excerpts illustrate, the tariff is an exhaustive document, covering numerous types of service and contingencies between AT&T and its customers. The above-cited sections are material to COT's claims concerning delay and provisioning and its claims should have been addressed by looking to the tariff's provisions in the context of the Communications Act.

AT&T adopts this position, arguing that the filed-rate doctrine preempts COT's claims because COT is seeking to enforce a contract for services not provided for in the tariff. COT is therefore impermissibly seeking "an advantage or preference not open to all and not provided for in the published tariffs." *Kirby*, 225 U.S. at 166.

As noted earlier, COT counters that the filed-rate doctrine does not apply because COT was not demanding better service for the tariffed rate. Instead, COT argues that "while COT paid the same rates as AT&T's favored corporate customers, COT was given inferior SDN service and denied SDN features that were provided to AT&T's favored customers." However, if this truly were COTs claim, its remedy was to bring a suit for discrimination under 47 U.S.C. §§ 202, 206, and 207.[1]

COT also argued that "it is elementary" that the filed-rate doctrine does not apply to untariffed services, or in other words, that common-law applies to fill in gaps left in tariffs. The majority accepts this contention. However, none of the three cases cited by COT support this "elementary" proposition. *MCI v. Credit Builders of Am., Inc.*, 980 F.2d 1021, 1022-23 (5th Cir.), *vacated*, 508 U.S. 957, *reinstated*, 2 F.3d 103, *cert. denied*, 510 U.S. 978 (1993), holds only that a carrier's suit to collect unpaid tariffed charges does not "arise under" federal law within the meaning of 28 U.S.C. §§ 1331 and 1337. This holding is irrelevant to this case.[2] *Security Servs. Inc. v. K Mart Corp.*, 511 U.S. 431, 114 S. Ct. 1702, 1710 (1994), held only that a carrier cannot base a rate collection action on a tariff that is void. This is also inapplicable here.

Finally, *US Wats, Inc. v. AT&T*, No. Civ.A 93-1038, 1994 WL 116009 (E.D.Pa. Apr. 5, 1994), comes closest to supporting COT's proposition. There, the district court

[1] On October 22, 1993, eight months after the discovery cut-off and long after the two-year statute of limitations had run (*see* 47 U.S.C. § 415), COT sought leave to filed a second amended complaint to add a claim that AT&T had engaged in discrimination against resellers in violation of § 202. The magistrate denied COT leave to file this amended complaint and COT does not appeal from this ruling.

[2] In any event, Ninth Circuit case-law holds the contrary position. *Sea-Land Serv. Inc. v. Murrey & Son's Co.*, 824 F.2d 740, 744 (9th Cir. 1987).

rejected AT&T's argument that the filed-rate doctrine preempted the plaintiff's breach of contract claim for refusing to transfer end users from one SDN to another because such a claim "will neither result in rate discrimination nor embroil the court in a dispute over the reasonableness of AT&T's charges in contravention of the FCC's ratemaking authority." *Id.* at *5.[3] Under *US Wats*, COTs claims are viable only if they would not result in rate discrimination.[4]

In footnote number 9, the majority cites *Kirby, Davis* and *Atchison* to refute AT&T's argument that "the filed-rate doctrine precludes a carrier from entering into 'side-deals' which give preference to certain customers and are not defined in the filed-rates." However, these cases all dealt with service provisions that were not specified in the tariff. It was *precisely because* the service provisions were not included in the tariff that the Supreme Court held that they were not enforceable as a matter of contract law.

COT also argues that the "savings clause" of 47 U.S.C. § 414 preserves its state-law claims. That section states: "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in

[3] In addition, it is arguable that *US Wats* was incorrectly decided because the plaintiff in that case should have properly brought a claim for discrimination under § 202(a) or unreasonable practices under § 201 rather than a claim for breach of contract.

[4] The two claims that went to trial—breach of contract and tortious interference with COT's contracts with its customers—both dealt with AT&T's alleged failure to provide SDN service in accordance with its "contract" with COT. This contract consisted of the tariff plus any oral or written statements not inconsistent with the tariff. Among other claims, COT alleged that AT&T breached the contract by failing to allocate properly the discounts between COT and its customers under Multilocation Billing, and by failing to provide SDN and MLCP services that were "functional" for COT. These claims either allege that AT&T failed to provide service according to the tariff, or are seeking to obtain services according to procedures that are not provided for in the tariff. Either way, COT's claims are preempted.

addition to such remedies." Initially, it is important to note that the Interstate Commerce Act contained an identical savings clause at the time of the Supreme Court's decision in *Kirby*. *See* 49 U.S.C. § 22.

In *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), the plaintiff brought a common-law state action arguing that a shipper's published rates were unreasonable and discriminatory. *Id.* at 430. The Court held the action to be preempted despite the savings clause. *Id.* at 446. As later described in *Nader v. Allegheny Airlines*, 426 U.S. 290, 298-99 (1976), the *Abilene Cotton* Court "found that the continuance of private damages actions attacking the reasonableness of rates subject to the regulation of the Interstate Commerce Commission would destroy the purpose of the Interstate Commerce Act, which was to eliminate discrimination by requiring uniform rates."

In *Nader*, the plaintiff brought a common-law action against an airline seeking damages sustained as a result of its overbooking practices. 426 U.S. at 292-93. The Court, distinguishing *Abilene Cotton*, concluded that the action was not preempted because the Court was not being called upon to make a determination of the reasonableness of a rate or practice that could be contrary to the regulatory agency's decision. *Id.* at 299. Any impact on rates, reasoned the Court, "would be merely incidental." *Id.* at 300.

In *Cooperative Communications, Inc. v. AT&T*, 867 F. Supp. 1511 (D.Utah 1994), an aggregator brought suit against AT&T. The district court held that the savings clause "preserves causes of action for breaches of duties distinguishable from those created under the Act." *Id.* at 1516. In other words, "state-law remedies which do not interfere with the Federal government's authority over interstate telephone charges or services, and which do not otherwise conflict with an express provision of the Act, are preserved by section 414." *Id.* (quoting *Kellerman v.*

MCI, 493 N.E.2d 1045, 1051, *cert. denied*, 479 U.S. 949 (1986)). The plaintiff alleged that AT&T attempted to drive it out of business by making intentional misrepresentations to the plaintiff's clients, by misappropriating plaintiff's confidential client billing information, and by attempting to destroy plaintiff's customer base. *Id.* at 1514. The court held the claims based on these allegations were not preempted. *Id.* at 1516.

Cooperative Communications is distinguishable because it did not involve a relationship between AT&T and its customer and did not implicate AT&T's duties under § 203. Because COT's claims seek better (or different) service than is published in AT&T's tariff, the savings clause does not save COT's claims. As in *Kirby*, the plaintiff's claims interfere with the purpose of the Act because they seek treatment that is different from the published tariff.

COT also argues that even if the filed-rate doctrine applies, its state-law claims remain viable because it was required to prove, in accordance with the tariff, that AT&T engaged in "willful misconduct." The tariff provides that the "Company's liability, if any, for its willful misconduct is not limited by this tariff." (§ 2.3.1.A.) AT&T argues that COT's claims are nevertheless preempted because the "willful conduct" consisted of willfully failing "to implement the very alleged side deals that are illegal and that would have given COT illegal preferences over other similarly-situated customers (i.e. resellers)."

AT&T's argument is supported by Supreme Court precedent. In *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94 (1915), the Court held that a passenger who purchased a train ticket at a rate misquoted by the ticket agent did not have a defense against the subsequent collection of the higher tariff rate by the railroad. As described by the Court in *Maislin*, the *Maxwell* Court's approach "was deemed necessary to prevent carriers from intentionally 'misquoting' rates to shippers as a means of offering them rebates or discounts." 497 U.S. at 127.

That AT&T willfully broke its "agreements" with COT should not alter the *Kirby* preemption analysis. If it could, the *Kirby* approach to the filed-rate doctrine would be rendered a nullity. That the tariff did not limit AT&T's liability for "willful misconduct" does not mean that COT should not still have to pursue damages for such misconduct through §§ 202, 206 and 207 of the Act.

C. *Conclusion*

The outcome that I advocate may appear inequitable. I share the majority's concerns about AT&T's conduct in its dealing with COT. However, the Supreme Court has consistently ruled that the filed-rate doctrine's precepts outweigh any equitable issues. We may question the wisdom of the filed-rate doctrine, but it is the law of the land. *See MCI*, 114 S. Ct. at 2233. ("[O]ur estimations . . . of desirable policy cannot alter the meaning of the Federal Communications Act of 1934.")

I dissent because the majority's decision is a significant one. The result will allow COT to conduct another trial, where it will present evidence about how badly AT&T treated it and in which the only determination for the jury will be the amount of punitive damages to award to COT. Although this would be the correct disposition if COT's claims were not preempted, I believe that the filed-rate doctrine bars those claims. Therefore, I dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 91-1236-JE

CENTRAL OFFICE TELEPHONE, INC.,
Plaintiff,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
Defendant.

OPINION

JELDERKS, Magistrate Judge:

Plaintiff Central Office Telephone, Inc. (COT) brought this action against American Telephone and Telegraph Company (AT&T). AT&T denied liability, and brought a counterclaim against COT. COT's claims for breach of contract and intentional interference with business relations were tried to a jury, which found in COT's favor and awarded damages in the amount of $13,000,000. The jury also found in COT's favor on AT&T's counterclaim.

AT&T now moves for judgment as a matter of law, for a new trial, or for remittitur. I deny the motion for remittitur, and grant in part and deny in part the motion for judgment as a matter of law. Pursuant to Fed. R. Civ. P. 50(c), I conditionally deny AT&T's motion for a new trial. For the reasons set forth below, I am entering an amended judgment reducing COT's award to $1,154,000.

BACKGROUND

The background of this action is fully set forth in Findings and Recommendations and Opinions issued earlier, and will be set out only briefly here.

COT, an Oregon corporation, resells communications services provided through other companies, formerly including defendant AT&T. This action concerns AT&T's provision of a service known as the "Software Defined Network" (SDN). SDN is a form of long distance service that AT&T provides to certain large customers, who receive volume discounts by subscribing to purchase large blocks of communication time. Customers who do not need all of the purchased time may resell unused portions to other users. Independent businesses like COT can also resell SDN services by aggregating smaller customers who alone do not use enough long distance services to qualify for volume discounts. COT sought to realize profits by retaining a portion of the large-user discount for itself, and passing on a portion of the discount to its "aggregated' customers.

COT initially contracted for AT&T's SDN services in October 1989, and entered into a second contract for SDN services in April 1990. At trial, COT presented considerable evidence that it experienced serious delays and errors in provisioning and billing soon after it began selling SDN services to its customers. COT's sales of AT&T's SDN services rose from February 1990 through August 1990. They subsequently declined rapidly, at least in part because COT salespersons more actively promoted sales of the services of other carriers, especially Sprint, because of delays in receiving commissions on SDN sales.

In a letter dated September 17, 1992, COT informed AT&T that it wished to be disconnected from SDN, and that it would not pay for any usage charges that might be incurred after September 30, 1992. At trial, COT personnel testified that COT discontinued sale of SDN because

of the problems it experienced with provisioning and billing of the SDN services. COT had alleged earlier, however, and one of its witnesses testified at trial, that COT stopped selling SDN at that time at least in part because of SDN price increases.

COT's claims for breach of contract and intentional interference with prospective business advantage were tried to the jury, which was instructed that it could award damages only if it found that AT&T had engaged in willful misconduct. The jury determined that COT should recover $13,000,000 to compensate for profits lost until the year 2000. That amount was one of three possible total damage figures offered by Mr. Hainline, COT's damages expert. Hainline testified that one of his calculations showed "approximately 13 million" in past and future profits that COT would have realized "absent difficulties" with the provision and billing of SDN services. Another of Hainline's calculations showed total lost past and future profits of approximately $17,500,000. Hainline later testified that this figure should be reduced to account for a number of variables, and that the "appropriate combined damage number" was $14,500,000.

STANDARDS

1. *Motion for a New Trial*

The court must grant a motion for a new trial if it concludes that the verdict is against the clear weight of the evidence. *Landes Const. Co., Inc. v. Royal Bank of Canada*, 833 F.2d 1365, 1372 (9th Cir. 1987); *Fenner v. Dependable Trucking Co.*, 716 F.2d 598, 602 (9th Cir. 1983). The court can weigh the evidence and assess the credibility of the witnesses, and is not required to view the evidence from the perspective most favorable to the prevailing party. *Landes Const.*, 833 F.2d at 1371.

A motion for a new trial is properly granted when the court concludes that the jury has reached a seriously erroneous result, *Digidyne Corp. v. Data General Corp.*,

734 F.2d 1336, 1347 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985), or when a new trial is necessary to avoid a miscarriage of justice. *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1359 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977). A motion for a new trial may also be granted where substantial errors were made in admission of evidence or jury instructions. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940).

2. *Remittitur*

Remittitur is available to correct excessive verdicts. *See Fenner*, 716 F.2d at 603 n. 3. A trial court reviewing a damage award attacked by a defendant as excessive must consider the evidence of damages in a light most favorable to the prevailing party. *Seymour v. Summa Vista Cinema, Inc.*, 809 F.2d 1385, 1387 (9th Cir. 1987).

If it concludes that a damages award is excessive, the court may either grant the defendant's motion for a new trial, or deny the motion, conditioned upon the prevailing party's acceptance of a remittitur. *Id.* A trial court granting a motion for remittitur does not substitute its judgment for that of the jury, but instead reduces the judgment to the maximum amount sustainable by the proof. *D & S Redi-Mix v. Sierra Redi-Mix & Contracting Co.*, 692 F.2d 1245 (9th Cir. 1982), *citing Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 586 (8th Cir. 1981); *Keye v. Lauga*, 635 F.2d 330 (5th Cir. 1981); *Bonura v. Sea Land Service, Inc.*, 505 F.2d 665, 669 (5th Cir. 1974). A prevailing party that has accepted a remittitur cannot challenge the remittitur on appeal or cross appeal. *999 v. C.I.T. Corp.*, 776 F.2d 866, 873 (9th Cir. 1985), *citing S. Birch & Sons v. Martin*, 244 F.2d 556, 560 (9th Cir.), *cert. denied*, 355 U.S. 837 (1957).

3. *Motion for Judgment as a Matter of Law*

A party is entitled to judgment as a matter of law, formerly known as a judgment notwithstanding the verdict

(JNOV), if the evidence, viewed with all reasonable inferences taken in favor of the nonmoving party, does not support the verdict. *See, e.g., Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1387 (9th Cir.), *cert. denied*, 469 (1984). If the jury verdict is supported by substantial evidence, the court cannot weigh the evidence or substitute its judgment for that of the jury. *Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1151 (9th Cir. 1988). A motion for judgment as a matter of law should be granted if, without considering the credibility of the witnesses, the evidence and inferences that may be drawn from it, viewed most favorably for the nonmoving party, can support only the conclusion that the moving party is entitled to judgment. *Id.* A motion for judgment as a matter of law should not be granted if reasonable minds could differ over the verdict. *United States v. Callahan*, 884 F.2d 1180, 1183 (9th Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990).

DISCUSSION

Before turning to the basis for my decision to grant in part AT&T's motion for judgment as a matter of law and to enter an amended judgment, I will briefly discuss why I have concluded that a new trial or remittitur are not appropriate.

1. *Motion for New Trial*

As noted above, a motion for a new trial is properly granted only if the verdict is against the clear weight of the evidence, where a new trial is necessary to avoid a miscarriage of justice, or where substantial errors were made in admission of evidence or jury instructions. Here, after carefully reviewing the parties' arguments and studying substantial portions of the trial transcript, I have concluded that I erred in allowing the juy to award damages for any period of time after COT terminated its relationship with AT&T. I am satisfied, however, that sufficient evidence supported the jury's conclusions as to

liability on COT's claims and AT&T's counterclaim. Though it presents a close question, I have also concluded that sufficient evidence supported the jury's award of damages up to the time COT discontinued its sale of SDN services.[1] I am likewise satisfied that, except for my error in not striking damage testimony related to the post-September 1992 period, there were no substantial errors in the admission of evidence to mislead the jury. Further, except for allowing the jury to allocate damages for the post-September 1992 period, I do not think that my instructions were incorrect.

If a party seeking judgment as a matter of law also moves for a new trial, Fed. R. Civ. P. 50(c) requires a court granting a motion for judgment as a matter of law to determine whether a new trial should be granted if the judgment is later vacated or reversed. Pursuant to this rule, I conditionally deny AT&T's motion for a new trial. If an appellate court concludes that I erred in granting in part AT&T's motion for judgment as a matter of law, the $13,000,000 jury verdict should stand. If my original decision to submit the issue of post-September 1992 damages to the jury on the evidence presented had been correct, the award would not be against the clear weight of the evidence or the product of erroneous evidentiary rulings and instructions.

2. *Remittitur*

In granting a remittitur, the court reduces the judgment to the maximum amount that is supported by the evidence. My reduction of the judgment here does not reflect a conclusion that the jury award was excessive, as that term is used in the context of remittitur. As discussed below, whether COT's evidence and methodology are sufficient for the period of time before COT stopped purchasing and reselling SDN services in September 1992. I therefore am not amending the judgment to reduce the damages as a remittitur. Instead, I am reducing the judgment to correspond to only that peiod of time for which I should have allowed the jury to consider awarding damages. The amended judgment provides COT a full recovery of the amount awarded by the jury through September 1992, when COT discontinued sale of SDN services. As discussed below, I erred, as a matter of law, in allowing the jury to consider and to award damages beyond that date.

[1] Because the damages that the jury awarded for that period are discernable from the record, the proper remedy for my error is not the granting of a new trial on the damages question, but a reduction of the damages to the pre-termination amount.

3. *Judgment as a Matter of Law*

a. *Filed Tariffs and Federal Communications Act (FCA) preemption*

AT&T contends that it is entitled to judgment as a matter of law because "[t]he filed tariffs doctrine and the comprehensive scheme of the Federal Communications Act bar COT's claims." It argues that COT's breach of contract claim related to only "matters governed by filed tariffs," and that those tariffs preempted "state law contract claims." AT&T further argues that COT's tort claim is "cognizable under," and preempted by, the Federal Communications Act. It also contends that, even if COT's claims were not preempted, I improperly instructed the jury that it could look outside the tariffs to determine the terms and conditions of the parties' agreement.

I need not address these arguments at length here. The parties' respective positions on the filed tariff doctrine were extensively briefed and argued throughout the course of this litigation. I remain convinced that the critical conduct here was largely outside the scope of the tariffs. As I noted in an opinion filed on December 8, 1993, COT challenged not the reasonableness or validity of the filed rate—issues properly subject to the filed rate doctrine—but the manner in which AT&T provided its services. In

addition, Multi Location Billing (MLB), a subject of considerable contention in this dispute, is an untariffed service that is subject to a separate agreement between the parties.

I also remain convinced that the jury was properly instructed as to how it should determine the parties' rights and obligations. The jury was instructed that those rights and obligations were controlled by the terms of any applicable tariffs, and that the parties could make no agreements contrary to the tariffs. The jury was likewise instructed, consistently with the tariffs, that AT&T could be liable only for willful misconduct

b. *Damages*

In calculating COT's damages, Hainline established as a base line for COT's SDN sales the seven-month period between February and August 1990. Hainline determined that SDN monthly sales averaged $17,805 during that period, and chose that particular time because sales of SDN subsequently dropped rapidly. Using a trend line based upon sales of SDN during the base period he had selected, Hainline started from a monthly base sales total of $67,355 for April 1990, and added increments of $17,805 to that amount for each of the next six months. He increased the projected monthly growth to $25,000 for each month in the subsequent six-month period, and ultimately projected that, with the addition of new salespersons, sales of SDN would have increased another $35,000 per month during a later period. Hainline hypothesized that, but for AT&T's failure to properly deliver SDN services, COT would have realized gross revenues of $15,342,000 through September 1992. Hainline calculated the lost profits associated with those lost revenues as $1,154,000. He calculated that COT's inability to market SDN cost the company another $28,200,000 in lost revenue, representing lost profits of $2,971,000, between September 1992 and April 1994. Applying the same methodology, with some minor modifications, Hainline calculated that COT lost an additional $9,088,800 between April 1994 and the year 2000. Hainline based his trial testimony that COT lost profits of "approximately 13 million" on a totalling of the lost profits from those three periods. The jury's verdict of $13,000,000 is obviously based upon that total.

During the trial, AT&T moved to strike Hainline's damages analysis on a number of grounds. I had serious reservations about COT's lost profits evidence, and about the appropriateness of allowing the jury to award damages for projected lost future profits beyond the time when COT terminated its relationship with AT&T. A thorough review of the trial testimony and exhibits related to damages has only reinforced my concerns. The following are some of the problems with COT's damages evidence:

(1) Hainline– lacked important information about COT's sales force. He did not know, for example, what COT sales people did after August 1990, and speculated that the sales force might have stopped selling communications services after COT began having problems with SDN provisioning and billing. COT's sales force did not in fact disappear, but continued to sell communications services obtained primarily through Sprint. In addition, Hainline concluded that COT could support 10 sales people—six more than it actually employed—and assumed that these additional persons would sell at the same rate as the then existing sales persons. These projections are simply assumptions for which I find no evidence other than Hainline's opinion. Certainly, Hainline was qualified to testify as an expert on certain matters. Even experts, however, must have some objective and verifiable basis for their opinions.

(2) Though he testified that he had "implicitly given an effect to bad debts," Hainline testified that he did not make any specific allowance for the failure of some customers to pay their bills. Hainline said that he assumed that bad debts would "not exceed the additional costs that

COT had incurred," an apparent reference to costs associated with past billing problems. He did not, however, offer a basis for that assumption.

(3) Though SDN and other communications services are based upon a complex and changing technology, Hainline made no allowances for the possibility that SDN's value, marketability, and profitability might be seriously affected by technological changes before the year 2000. Instead, with no apparent basis within his own area of expertise, Hainline simply concluded that it "did not seem unreasonable . . . that there was 5-1/2 years left on the technology. . . ."

(4) Hainline erroneously assumed that COT had intended to stay with MLB throughout the time it planned to market SDN. Gordon Rood, COT's president, testified that COT had always intended to do its own billing after it had grown.

(5) In calculating lost profits, Hainline assumed that the discount levels—the rate reductions that COT shared with its customers—would stay constant until the year 2000. He did not know the current SDN discount level or rates per minute at the time of trial, and was unaware that, under the applicable tariffs, AT&T could change the discount levels on 14 days notice.

(6) In conducting his damage study, Hainline did not talk to any of COT's customers or to any other resellers. Nothing in his testimony or in the exhibits he prepared indicates that he accounted for the possibility that the substantial profits he projected for COT would attract competition that could reasonably be expected to ultimately reduce COT's sales and profits.

(7) Hainline testified that his projections of lost future sales and profits was based upon his understanding that SDN was a unique product, superior to any competing services. He also testified, however, that he had not studied the features or costs of the services offered by MCI and Sprint, and that he had not examined the time it generally took to provision a customer who had chosen Sprint instead of AT&T. His conclusion that SDN was a "unique product in a unique market" therefore lacks sufficient foundation. Hainline's assumptions as to the uniquely appealing characteristics of SDN appear to be inconsistent with Rood's testimony that, after a certain date, COT's salespersons would, in the vast majority of cases, sign up customers on Sprint instead of AT&T. COT's ability to sell Sprint to customers who otherwise might have purchased SDN seriously undermines the contention that AT&T's product was "unique" as that term is generally understood when a reseller asserts an injury based upon a supplier's failure to deliver.

Hainline's failure to carefully examine services available for resale from AT&T's competitors is significant. A reseller can recover profits lost as a result of a supplier's failure to deliver only if it cannot obtain substitute performance from another supplier. *See Calbag Metals Co. v. Guy F. Atkinson Co.*, 95 Or. App. 514, 518-519, 770 P.2d 600, 602-603 (1989); *United Engine Parts, Inc. v. Ried*, 283 Or. 421, 432, 584 P.2d 275 (1978); *Consolidated Data Terminals v. Applied Digital Data Sys.*, 708 F.2d 385, 394-395 (9th Cir. 1983). Here, Hainline's analysis failed to acknowledge or account for the fact that, as COT's sales of SDN decreased, its sales of Sprint increased.

(8) Hainline's study assumed that, once COT no longer sold SDN services, all profits that it might have realized through selling SDN were "lost." This assumption was incorrect because it failed to account for profits COT might realize by selling services obtained from AT&T's competitors. COT clearly has continued in business. That being the case, one can only rationally assume that at least some of the efforts that the company might otherwise have expended in marketing SDN and servicing its SDN ac-

counts have been diverted to reselling and servicing accounts using services of AT&T's competitors.

(9) AT&T provides SDN services in a heavily regulated industry, and is required to provide its services to customers such as COT on a nondiscriminatory basis. In projecting more than seven years of lost profits based upon the termination of the parties' relationship, Hainline did not consider whether the problems which caused COT to terminate its sales of SDN in 1992 still existed by the time the contracts were otherwise scheduled to terminate,[2] and whether those problems could reasonably be expected to exist until the year 2000. This is significant, because it appears that, if COT sought to again purchase those services, AT&T would have an ongoing legal obligation to furnish SDN services to COT for resale on the same terms and conditions that it provides SDN to other customers.

To briefly summarize, Hainline projected nearly 10 years of lost profits based upon only a few months of actual sales. Hainline is not an expert in the complex field of communications technology, and he failed to consider price changes, changes in provisioning delays, AT&T's obligation to provide SDN on a nondiscriminatory basis, the availability of substitute products, or the fact that COT sold other products to customers who otherwise might have purchased SDN.

Damage calculations must be based upon reasonable assumptions, and must be consistent with real business

[2] Rood testified that COT salespersons would have preferred to sell SDN rather than Sprint, but had to sell Sprint because SDN was not provided on a timely basis. Curiously, Rood was unaware of how long it normally took to provision COT customers purchasing SDN by the time COT terminated its relationship with AT&T. AT&T presented evidence at trial that it was provisioning SDN customers within 30 to 40 days by September 1992, and Rood testified that he thought that that interval, if achieved, would have met AT&T's obligation.

conditions. *See, e.g., Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256, 1262 (9th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982). Though it is a close question, I have concluded that Hainline's study is sufficiently grounded in objectively verifiable facts and reasonable assumptions to support the jury's award of lost past profits up to COT's termination of its SDN sales in September 1992. It clearly is not sufficient, however, to support more than seven years of lost profits beyond that point. The huge lost profits Hainline projected simply cannot, under the facts in evidence in this action, rest on so narrow a base.

As noted above, a party is entitled to judgment as a matter of law if the evidence, viewed with all reasonable inferences taken in favor of the nonmoving party, does not support the verdict. Here, drawing all reasonable inference in COT's favor, the evidence would support only the conclusion that COT is not entitled to recover damages for the period following its termination of its agreements with AT&T. Beyond that point the evidence of damages became simply too speculative and attenuated, and COT's contention that it was entitled to further recovery is legally untenable. As a matter of law, I should have stricken evidence of the post-September 1992 period, and should not have allowed the jury to consider awarding damages past that time.

In concluding that I should have stricken this evidence, I am mindful that a plaintiff is not required to prove the amount of damages incurred with mathematical certainty, but instead "need only establish the fact of damages and evidence from which a satisfactory conclusion as to the amount of damages can be reached." *North Pacific Lumber v. Moore*, 275 Or 359, 366, 551 P.2d 431 (1976). Given that SDN is a complex technology sold in a competitive and changing market, at varying prices, the evidence COT produced could not allow a "satisfactory conclusion" as to the amount of damages, if any, actually incurred after September 1992.

My conclusion that COT cannot recover for the post-September 1992 period is based in part upon the speculative nature of the evidence of lost profits past that point, and upon the lack of support for many of the critical assumptions made by COT's damages expert. It is also based upon the legal requirement, noted above, that a seller in COT's position demonstrate that substitute sources of supply were not available,[3] and upon COT's failure to establish that AT&T was not materially performing by that time. In arguing that it is entitled to recover damages until the year 2000, COT relies upon Oregon cases stating that, following a total breach of contract, a non-defaulting party may consider the contract terminated and bring an action for damages. *See Mohr v. Lear*, 239 Or. 41, 395 P.2d 117 (1964); *Krebs Hop Co. v. Livesley*, 59 Or. 574, 114 P. 944 (1911). This reliance is misplaced. As the *Mohr* court noted, an action for damages grounded upon repudiation or total breach must be based upon conduct motivated by a "positive, definite, absolute, unconditional and unequivocal intent evincing a fixed purpose not to perform in any event." *Mohr*, 239 Or at 49. In the present action, the evidence admitted at trial would not support the conclusion that AT&T was demonstrating an unequivocal intent not to perform at the time COT terminated its sale of SDN. Instead, the evidence would support only the conclusion that AT&T had corrected, or was in the process of correcting, problems with provisioning of its SDN services. Certainly, given the

[3] Because COT was selling Sprint services before September 1992, this conclusion could lead one to question my decision to allow the verdict to stand up to that period. I have concluded that the verdict should stand to that point because the jury could reasonably have concluded that problems with SDN provisioning and billing seriously disrupted COT's operations, and reduced its profits in the amount represented by the portion of the $13,000,000 award related to that period. The jury could reasonably have concluded that, until COT terminated its purchase of SDN, AT&T both interfered with its prospective business advantage, and failed to meet its contractual obligation to furnish a "functional" SDN.

significant problems that COT had encountered regarding SDN, the jury could have reasonably concluded that COT was entitled to discontinue its relationship with AT&T without penalty, and that it was entitled to recover past lost profits caused by AT&T's breach of contract and interference with COT's prospective business advantage. The jury's conclusion that COT was not liable on AT&T's counterclaim was also supported by the evidence. As a matter of law, however, COT could not, under these circumstances, terminate the contract and continue to recover damages for more than seven additional years.

CONCLUSION

I deny AT&T's motion for remittitur (#448-3). I grant in part and deny in part AT&T's motion for judgment as a matter of law (#448-1), and will enter an amended judgment in the amount of $1,154,000. Pursuant to Fed. R. Civ. P. 50(c), I conditionally deny AT&T's alternative motion for a new trial (#448-2).

DATED this 9th day of November, 1994.

/s/ John Jelderks
JOHN JELDERKS
United States Magistrate Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 91-1236-JE

CENTRAL OFFICE TELEPHONE, INC.,
Plaintiff,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
Defendant.

ORDER

JELDERKS, Magistrate Judge:

Defendant AT&T's motion for remittitur (#448-3) is DENIED. Defendant AT&T's motion for judgment as a matter of law (#448-1) is GRANTED in part and DENIED in part, and an amended judgment in the amount of $1,154,000 will be entered. AT&T's alternative motion for a new trial (#448-2) is conditionally DENIED pursuant to Fed. R. Civ. P. 50(c).

DATED this 9th day of November, 1994.

/s/ John Jelderks
JOHN JELDERKS
United States Magistrate Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 91-1236-JE

CENTRAL OFFICE TELEPHONE, INC.,
Plaintiff,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
Defendant.

AMENDED JUDGMENT

Based on the record,

IT IS HEREBY ORDERED that the judgment entered on July 1, 1994 is amended. Judgment in the amount of $1,154,000 is entered in favor of plaintiff. Interest shall accrue on this amount commencing July 1, 1994.

DATED this 9th day of November, 1994.

/s/ John Jelderks
JOHN JELDERKS
U.S. Magistrate Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 91-1236 JE

CENTRAL OFFICE TELEPHONE, INC.,
Plaintiff,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY,

FINAL JUDGMENT

This action came on for trial before the Court and a jury, the Honorable John A. Jelderks, United States Magistrate Judge, presiding, and the issues having been duly tried and a jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED

That the Plaintiff, Central Office Telephone, Inc., recover from the Defendant, American Telephone & Telegraph Company, the sum of THIRTEEN MILLION DOLLARS ($13,000,000), with post-judgment interest thereon compounded annually at the federal interest rate of five and thirty-one hundredths percent (5.31%); and

That the Defendant take nothing on its counterclaim, and that the counterclaim is dismissed on the merits; and

That the Plaintiff recover the costs of this action.

DATED at Portland, Oregon, this 1st day of July, 1994.

/s/ John Jelderks
THE HONORABLE JOHN A. JERDERKS
United States Magistrate Judge

APPENDIX E

[Filed Jul. 18, 1997]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 94-36116; 94-36156
D.C. NO. CV-91-1236-JAJ

CENTRAL OFFICE TELEPHONE, INC.,
Plaintiff-Appellee and
Cross-Appellant,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
Defendant-Appellant
and Cross-Appellee.

Before: FERGUSON and BRUNETTI, Circuit Judges, and KING,* District Judge.

Judge Ferguson and Judge King have voted to deny the petition for rehearing. Judge Brunetti has voted to grant the petition for rehearing. Judge King has voted to reject the suggestion for rehearing en banc, Judge Ferguson has recommended rejection of the suggestion for rehearing en banc. Judge Brunetti has voted to accept the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no active judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

*** Hon. Samuel P. King, Senior United States District Judge for the District of Hawaii sitting by designation.**

APPENDIX F

COMMUNICATIONS ACT (47 U.S.C. §§ 151, ET SEQ.)

§ 201. Service and charges (47 U.S.C. § 201)

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of gen-

eral circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

§ 202. Discrimination and preferences (47 U.S.C. § 202)

(a) Charges, services, etc.

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services included

Charges or services, whenever referred to in this chapter, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communications of any kind.

(c) Penalty

Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $6,000 for each such offense and $300 for each and every day of the continuance of such offense.

§ 203. Schedules of charges (47 U.S.C. § 203)

(a) Filing; public display

Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) Changes in schedule; discretion of Commission to modify requirements

(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after one hundred and twenty days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or

conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

(c) Overcharges and rebates

No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) Rejection or refusal

The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) Penalty for violations

In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $6,000 for each such offense, and $300 for each and every day of the continuance of such offense.

APPENDIX G

EXCERPTS FROM AT&T COMMUNICATIONS, INC. TARIFF F.C.C. NO. 1

(5th Revised Page 23
Effective: December 2, 1986)

2.3. RESPONSIBILITIES OF THE COMPANY

2.3.1. Liability

A. The Company's liability, if any, for its willful misconduct is not limited by this tariff. With respect to any other claim or suit, by a Customer or by any others, for damages associated with the installation, provision, termination, maintenance, repair or restoration of [long distance service], and subject to the provisions of B. through G. following, the Company's liability, if any, shall not exceed an amount equal to the initial period charge provided for under this tariff for the [long distance service] call for the period during which the call was affected or, for a DIAL-IT 900 Service Sponsor, shall not exceed an amount equal to the charge a Sponsor would pay pursuant to Section 5.1.3.B.4. following, if the Sponsor received no calls during the program day for which the DIAL-IT 900 Service was affected. This liability for damages shall be in addition to any amounts that may otherwise be due the Customer under this tariff as a credit allowance (see Credit Allowances for Interruptions, page 29).

* * * *

(8th Revised Page 26.3
Effective: August 23, 1989)

2.5. PAYMENTS AND CHARGES

2.5.10. Cancellation, Delay or Change of an Order—The regulations set forth in this section apply for canceling, delaying or changing an order for any [long distance service] components except for [long distance service] components in Section 3, Conference Services in Section 4, or Other Services in Section 5 to which monthly charges normally apply.

When an order for service is placed, a due date will be established and confirmed with the Customer. If the due date is delayed, the appropriate terms and conditions outlined in A. or B. following apply:

* * * *

(2nd Revised Page 26.4
Effective: September 13, 1985)

B. Delay of a Due Date by the Company—The Company will make every reasonable effort to assure that the [long distance service] offering ordered is furnished on the due date. However, in some cases a delay in the installation may be unavoidable. If an order is delayed beyond its due date for more than 45 cumulative calendar days and such delay is not requested or caused by the Customer, the Customer may cancel the order without penalty or payment of non-recurring charges.

C. Cancellation of an Order—A Customer may cancel an order at any time prior to the due date. An order is considered to have been cancelled when the Company receives a notification of cancellation from the Customer. Such notification may not be retroactive.

Cancellation Charge(s) will apply as follows, unless caused by Company delay as specified in B. preceding, or otherwise specified in the section applicable to the specific service:

1. When the Customer cancels an order prior to the start of plant work activity, the Service Ordering Charge relative to the activity involved will apply.

2. Installation of a service order is considered to have started when the Company begins to process a service order.

(1st Revised Page 26.5
Effective: September 13, 1985)

3. When the Customer cancels an order after plant work has started, a charge equal to the costs incurred in such installation will apply, less estimated net salvage. This charge will include the nonrecoverable cost of equipment and material ordered, provided or used, plus the nonrecoverable cost of installation and removal including the costs of engineering, labor, supervision, transportation, rights of way and other associated costs. Estimated net salvage will be based on recoverable cost of reusable equipment and material.

* * * *

(6th Revised Page 149
Effective: October 15, 1989)

6.2. REGULATIONS

6.2.4. Allocation of Usage or Charges—The Company will not allocate the usage of a Custom Network Service or the charges for such usage and is not responsible for the way the Customer may allocate usage or charges among multiple Users. . . .

(2)

Supreme Court, U.S.
FILED
NOV 14 1997
CLERK

No. 97-679

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

AT&T CORP.,

Petitioner,

v.

CENTRAL OFFICE TELEPHONE, INC.,

Respondent.

Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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November 17, 1997

QUESTION PRESENTED

Whether the Ninth Circuit correctly concluded that a jury verdict for intentional interference with business relationships and for breach of contract, based on willful misconduct by a long-distance telecommunications carrier in seeking to eliminate a competitor, was not in this case related to rates or rate-setting, such that the filed rate doctrine did not apply?

LIST OF PARTIES AND AFFILIATES

The petition accurately lists the parties to the proceeding.

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STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Central Office Telephone, Inc. ("COT") is a reseller of long-distance telecommunication services. Resellers are firms that purchase "bulk" long-distance services from carriers and resell them to their own customers. They qualify for volume discount plans by aggregating the business of multiple customers who would not individually qualify for volume discounts. The reseller is the customer of the long-distance carrier, as well as its competitor, and the end users are the customers of the reseller.

In the fall of 1989, COT became aware of the opportunity to resell AT&T's "Software Defined Network" ("SDN") service to its customers. Ninth Circuit Excerpt of Record (hereinafter "ER") 365-66. SDN is a virtual private network service that allows an AT&T customer, in consideration for a commitment to purchase large volumes of minutes of long distance usage, to receive substantially higher discounts than provided for other available AT&T long-distance services. ER 589-90, 2529, 3526, 3545, 3021-23.

COT developed a business plan to include the addition of salesmen, telemarketing and expansion into other states, and on October 30, 1989 signed an agreement letter memorializing COT's selection of SDN Expanded Volume Program Plan 2, under which COT would receive up to a 20% discount off basic SDN rates in exchange for a

renewable commitment to purchase 2 million minutes annually. ER 405, 4396, 4447, 416, 3721-24, 2336-37, 431, 4515-16. COT also selected the SDN Multiple Location Billing Option under which AT&T would bill up to 6,000 of COT's SDN service locations at no extra charge. ER 414-16.

When COT began selling SDN services it immediately experienced provisioning delays. Due to these problems, AT&T suggested that COT "park" its customers under a new and different service known as Multi-Location Calling Plan ("MLCP"). ER 418-21. Its stated purpose was to serve COT's customers' long-distance needs until they could be provisioned onto SDN. This service commenced on March 8, 1990. ER 417, 3737-38A.

On April 9, 1990, AT&T informed COT that its first account had been placed onto the SDN. ER 432. Believing that its SDN was now functional, COT upgraded its SDN subscription to Plan 6, which offered a larger discount (up to 25%) in exchange for a larger volume commitment (15 million minutes annually). ER 4037.

Unbeknownst to COT, on or about March 1, 1990, AT&T, through an Ad Hoc Committee formed to "kill" the arbitrage by which resellers conducted their business, initiated multiple strategies to discourage resale (set forth below). ER 1222, 1238-39, 3415, 3735-36, 3739-41, 3743. After COT signed the April 9 contract and continuing until September 30, 1992, when COT canceled its SDN contract with AT&T to avoid going out of business (ER 1942), COT and its customers experienced, among other things, transferred accounts (ER 440-43, 599-600, 1686, 3379),

decreased service (ER 441-42, 1838-39, 1891, 2577, 3149, 3647), slow or non-existent provisioning of both SDN and MLCP orders (ER 458-59, 1277, Ninth Circuit Supplemental Excerpt of Record (hereinafter "SER") 33), lost orders (ER 423), limited calling card service (ER 401-03, 748-50), discount misallocation between COT and its customers (ER 968, 1754-55, 468-69, 471, 1709, 2670, 4171, 4180, 1762, 2600-01, 2672-73), incorrect billing (ER 481-84), untimely call detail billing (ER 451-52, 1405, 1895, 2676-77), delayed billing (ER 738, 4308), and "slamming" of customers (ER 746, 1877, 4278-96). As of the termination date, COT had lost over 75% of its customer base. ER 3085.

II. PROCEEDINGS BELOW

On June 27, 1994, in the United States District Court for the District of Oregon, a jury found AT&T liable for willful misconduct in breaching its contract with COT, and intentional interference with COT's contracts with its customers. App. 1. The jury awarded COT damages against AT&T in the amount of $13,000,000. App. 2.

On November 9, 1994, the district court granted in part and denied in part AT&T's motion for judgment as a matter of law. ER 4771-90. The district court found that COT's evidence with respect to damages was not sufficiently grounded in objectively verifiable facts after 1992, when COT was forced by AT&T's conduct to terminate the contract, and reduced the damages award to reflect that decision. The district court determined that the proper amount of damages was $1.154 million. (The issues raised by the district court's reduction of COT's

$13 million verdict to a $1.154 million judgment are the subject of a separate petition for a writ of certiorari filed by COT.)

COT appealed from the district court's partial grant of judgment as a matter of law on several grounds. AT&T also appealed from the judgment against it.

On February 26, 1997, the United States Court of Appeals for the Ninth Circuit affirmed COT's judgment against AT&T. However, it reversed the district court's decision not to submit punitive damages evidence to the jury and remanded the case for trial on the issue of punitive damages. It also affirmed the district court's decision with regard to its partial grant of AT&T's motion for judgment as a matter of law. Central Office Telephone, Inc. v. American Telephone and Telegraph Co., 108 F.3d 981, 990-991, 993-994 (9th Cir. 1997), petition for cert. filed, 66 U.S.L.W. 3308 (U.S. Aug. 27, 1997) (No. 97-656) and petition for cert. filed, 66 U.S.L.W. 3308 (U.S. Oct. 16, 1997) (No. 97-679).

III. AT&T's MISSTATEMENTS OF THE CASE

AT&T presents a version of this case that bears little resemblance to the case that was actually tried to the jury. AT&T continually refers to COT's claims as mere contract claims seeking to enforce "side deals." This is a highly inaccurate description. It is difficult to discern it from AT&T's rendition of the facts, but this case concerns some very bad conduct by AT&T. AT&T's sanitized version of the case conceals most of the unpleasant (to

AT&T) evidence, and it also ignores that the Ninth Circuit has remanded for a trial on punitives.

COT's claims did not seek to enforce "side deals" for expedited service, as AT&T suggests. Rather, COT proved that it had suffered damages due to AT&T's intentional interference with COT's business relationships with its customers and other willful misconduct. COT's proof included the following:

(1) AT&T initially overpromoted the use of SDN by long-distance resellers to bolster its decreasing revenues in the late 1980s, and to wrestle business from MCI and other carriers. ER 1183-89. However, AT&T then realized that resellers could become formidable competitors to AT&T, and it adopted a corporate policy to "kill arbitrage" by resellers. ER 3735, 1203, 1206, 1219, 1222.

(2) AT&T formed an Ad Hoc Committee to implement this policy by establishing "roadblocks" to the use of SDN with the purpose of eliminating resellers. ER 3736, 1238, 1249-52, 3739-41, SER 27.

(3) One "roadblock" implemented by AT&T was to provision SDN for resellers at a glacial pace. As an AT&T executive said internally, "with a one percent provisioning rate [resellers] won't be around much longer." ER 1277.

(4) AT&T also had its telemarketers contact COT's SDN customers and, without authorization,

convert them into regular AT&T long-distance service, a practice known as "slamming." ER 746, 1579, 1877, 4278-96.

(5) AT&T failed to implement MLCP orders that COT submitted and failed to advise that it had not done so until several months later, by which time COT's customers had departed. ER 423, 1664, 2612, 4205-06, 738.

(6) AT&T delivered bills to COT's customers allocating to them 100% of COT's discount, so that COT would not receive any revenues. ER 968, 1754, 468-69, 471, 1709.[1]

(7) AT&T adopted a policy against allowing cash payments due to COT and other resellers

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[1] AT&T contends before this Court that its obligations related to billing services are governed exclusively by its tariff and the Federal Communications Act ("FCA"). In International Audiotext Network, Inc. v. American Tel. & Tel. Co., 893 F. Supp. 1207 (S.D.N.Y. 1994), aff'd, 62 F.3d 69 (2nd Cir. 1995), AT&T contended just the opposite. There, the Court ruled in favor of AT&T that FCA Sections 201 and 202 did not apply to billing services furnished by AT&T, since Title II of the FCA regulates communications services, and billing services that do not use communications over the carrier's wire or radio facilities are not communications services. 893 F. Supp. at 1223-24, citing, Matter of Detariffing of Billing & Collections Servs., 102 F.C.C.2d 1150, 1168 (1986); Matter of AT&T 900 Dial-It Services and Third Party Billing and Collection Services, 4 F.C.C. Rcd. 3429 (1989). Consistent with these authorities, an AT&T expert testified that AT&T's Multi-Location Billing services were not covered by its tariff. ER 1767, 1774. The AT&T expert likewise testified that the SDN tariff contains no terms pertaining to provisioning. ER 1774.

resulting from other AT&T discounts, with the purpose to "kill the resellers' cash flow." ER 1344, 3739-41.

(8) AT&T did not bill COT's customers for months after they were using COT's services, through a practice known as "suppressed" billing. ER 517, 1898-99. This not only suspended payments that were due to COT, it also made COT's customers irate and unwilling to pay what was due. ER 488, 1576, 4263, 4308, 524-26, 4308.

(9) AT&T denied COT and other resellers SDN calling cards, account teams, and SDN User Association memberships (which AT&T reserved for its Fortune 500 clients), and blocked international calling card calls. ER 748-50, 403, 440-42, 696-97, 753-55, 830, 1837-40, 1874-75, 2577.

(10) AT&T refused to respond to COT's pleas to address these and other problems (ER 486, 516), and AT&T personnel demonstrated AT&T's antipathy toward COT and other resellers by the epithets they used to describe them. AT&T managers referred to resellers as "cockroaches," "slime," and "convicts." ER 3405.

(11) After placing COT in the midst of these problems, AT&T forced it to cease dealing with local AT&T representatives to attempt corrections, but instead transferred its account to AT&T's Channel Development and Operations Center ("CDOC") in New Jersey, where

AT&T promised even poorer service.[2] ER 1837-40, 3149, 440-42, 1890-91.

Through these and other "roadblocks," AT&T nearly drove COT out of the reseller business. To survive, COT was forced to terminate its contract with AT&T in September 1992, with one and one-half years remaining on the contract. ER 1942, 481-86, 515-17.

This is the case that was actually tried to the jury. It did not involve a mere failure to provide expedited services, nor did it involve any secret "side deals."

REASONS FOR DENYING THE WRIT

1. AT&T's petition nearly ignores that it was found to have engaged in willful misconduct. It also suggests that the Ninth Circuit did not base its decision on AT&T's willful misconduct, even though the Ninth Circuit remanded the case for a trial on punitive damages. Once these omissions and misstatements are corrected, AT&T's filed rate doctrine argument evaporates. Even if AT&T's tariff exclusively governed the parties' relationship, it expressly allows for the claims at issue.

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[2] AT&T kept this promise. AT&T employees at CDOC were not trained and CDOC was not staffed to meet the SDN demands that followed AT&T's overpromotion. ER 1188-89, 1193, 1290, 1639, 2730-32, 2775, 2801. For example, several weeks after COT had been sending orders to CDOC, an AT&T supervisor finally called to ask "who Central Office Telephone was, and what in the world was all this paper [it was sending to New Jersey]." ER 1847. He then flatly stated that he "would not process [COT's] MLCP orders." ER 1848.

AT&T's tariff states: "The company's liability, if any, for its willful misconduct is not limited by this tariff." ER 4487. To the extent that the tariff applies, this case was tried precisely in accordance with its terms, and the jury found that AT&T had engaged in willful misconduct. AT&T concedes that there is no limitation on its liability for willful misconduct. AT&T's Petition for Centiorari 5.

For over a century, carriers have been prohibited from limiting their liability by tariff for claims based on willful misconduct. Primrose v. Western Union Tel. Co., 154 U.S. 1, 14 S. Ct. 1098 (1894). This fundamental principle predates and overrides any protections AT&T can garner from the filed rate doctrine. Courts have on several occasions held that willful misconduct claims are not precluded by the doctrine. See MCI Telecommunications Corp. v. TCI Mail, Inc., 772 F. Supp. 64 (D.R.I. 1991)(citing cases).[3]

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[3] The exception has been Marco Supply Co., Inc. v. AT&T Communications, Inc., 875 F.2d 434 (4th Cir. 1989). There, Marco Supply alleged that it had contracted with AT&T based on quotations of certain rates, which were substantially less than the amounts AT&T ultimately charged. The trial court dismissed Marco Supply's claims for breach of contract and willful misrepresentation based on the filed rate doctrine, and the Fourth Circuit affirmed. That decision has been criticized for its lack of analysis and for applying "blindly the doctrines that were spawned by the ICA." MCI Telecommunications Corp. v. TCI Mail, Inc., 772 F. Supp. at 68. Moreover, Marco Supply is distinguishable from this case in any event. The willful misconduct at issue in Marco Supply involved nothing but rates. Here, AT&T's willful misconduct did not relate to rates. In addition, Marco Supply's willful misrepresentation claim required proof of reasonable reliance. The court found that element to be lacking, since Marco Supply was

The filed rate doctrine does not protect AT&T from willful misconduct claims. Even if AT&T's tariff wholly defined the parties' relationship - which it did not - AT&T's tariff specifically preserves such claims.

2. To fashion this as a filed rate case, AT&T argues that COT wanted better or faster service than required by AT&T's tariff. It then parades several cases stating that rates filed by carriers are the only lawful charges. However, COT's claims do not challenge AT&T's rates, nor do they seek to enforce "side deals" for services not covered by AT&T's tariff. COT did not demand specialized services. Instead, while COT paid the same rates as AT&T's favored corporate customers, COT was offered services intentionally designed to be so defective as to put COT out of business and thus eliminate it as a reseller.

While the filed rate doctrine is "not limited to 'rates' *per se*," Nantahala Power and Light Co. v. Thornburg, 476 U.S. 953, 966, 106 S. Ct. 2349 (1986), it must have something to do with rates or rate setting. As the Ninth Circuit recognized in this case, not everything that a carrier inflicts upon a customer is sufficiently related to rates to bar common law remedies. This Court's decision in Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 96 S. Ct. 1978 (1976), demonstrates this point.

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presumed to know the published tariff rate. 875 F.2d at 436. Here, COT's claims have nothing to do with a misquoted rate or a misrepresentation as to rates. Reasonable reliance, found to be lacking in Marco Supply, is not an issue here.

In Nader, an airline passenger brought fraud claims against an airline arising from the airline's failure to apprise the passenger of its deliberate overbooking practices. This Court held that allowing a common law remedy in this situation did not create a conflict with the Federal Aviation Act's scheme for rate setting:

> The court in the present case, in contrast [to Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S. Ct. 350 (1907)], is not called upon to substitute its judgment for the agency's on the reasonableness of a rate -- or, indeed, on the reasonableness of any carrier practice. There is no Board requirement that air carriers engage in overbooking or that they fail to disclose that they do so. And any impact on rates that may result from the imposition of tort liability or from practices adopted by a carrier to avoid such liability would be merely incidental.

426 U.S. at 299-300.

AT&T likewise oversold its SDN services, and failed to disclose that it had done so. More significantly, AT&T subsequently changed its policy and intentionally implemented "roadblocks" to the resale of SDN, again without disclosure. There is no Federal Communications Commission ("FCC") requirement relating to either of these practices. Finally, as in Nader, any impact on rates that may result from the imposition of liability in this case would be merely incidental.

The Ninth Circuit reached a decision in this case that is entirely consistent with Nader.[4] It correctly concluded that COT's claims did not create a conflict with the FCA's statutory scheme, since they did not relate to rates or rate setting. The Ninth Circuit's decision was a fact-based decision that does not denigrate the filed rate doctrine, but finds it inapplicable under the particular facts involved.

3. The principal decisions of this Court that are relied upon by AT&T are Chicago & Alton R. Co. v. Kirby, 225 U.S. 155, 32 S. Ct. 648 (1912), Atchison, T. & S. F. Ry. Co. v. Robinson, 233 U.S. 173, 34 S. Ct. 556 (1914), and Davis v. Cornwell, 264 U.S. 560, 44 S. Ct. 410 (1924), all of which predate Nader by at least 50 years[5]. AT&T

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[4] The Ninth Circuit's decision is also consistent with previous Ninth Circuit decisions and decisions from other circuits. See Columbia Steel Casting Co. v. Portland General Elec. Company, 103 F.3d 1446 (9th Cir. 1996), as amended on denial of rehearing, 111 F.3d 1427 (1997), petition for cert. filed, 66 U.S.L.W. 3085 (U.S. Jul. 2, 1997) (No. 97-49); In re Lower Lake Erie Iron Ore Anti Trust Litigation, 998 F.2d 1144, 1159 (3rd Cir. 1993); Pacific S.S. Co. v. Cackette, 8 F.2d 259, 261 (9th Cir. 1925), cert. denied, 269 U.S. 586 (1926)(rejecting carrier's tariff-based defense on ground that customer's tort claim had "no perceptible relation to rates.") Subsequent decisions have also cited the opinion below with approval for the rather obvious proposition that where the claim at issue does not involve rates or rate-setting, the filed rate doctrine does not apply. County of Stanislaus v. Pacific Gas and Elec. Co., 114 F.3d 858, 865 (9th Cir. 1997); Swain v. AT&T Corp., No. CIVA3:94-CV-1088-D, 1997 WL 573464 (N.D. Tex., Sept. 9, 1997).

[5] Moreover, all of these decisions follow Texas & Pacific R. Co. v. Abilene Cotton Oil Co., which this Court found to be consistent with its decision in Nader. 426 U.S. at 299-300.

contends that these cases bring virtually every aspect of a carrier's services within the scope of the filed rate doctrine. However, these cases did not go that far. They each involved a customer who paid one tariff rate while claiming services that were not required by that tariff. In effect, these customers sought to pay a lower rate for services due under a separate tariff.

Here, COT paid the same rates as AT&T's other customers for the same services. While AT&T provided those services to its "high end customers," it provided COT with services intentionally designed to be so defective as to put COT out of the reseller business. This has nothing to do with AT&T's rates or even the relationship between a particular rate and a particular service.

The only relationship to rates that AT&T has been able to identify is based on the cost that AT&T will incur to satisfy COT's judgment. However, the fact that AT&T may attempt to pass this cost on to its customers through higher rates is not a sufficient relationship to rates to bring the filed rate doctrine into play. Nader expressly states that such an effect on rates is too attenuated. 426 U.S. at 300.

AT&T also argues that allowing a damages claim results in a disguised rebate favoring one of its customers, which the filed rate doctrine was designed to prevent. However, this Court has held that the potential for disguised rebates is not a sufficient reason to abolish claims of a customer who is truly damaged by a carrier's conduct. Chicago & N.W. Ry. Co. v. Lindell, 281 U.S. 14, 18, 50 S. Ct. 200 (1930); see also Southern Pacific Co. v. Miller Abattoir Co., 454 F.2d 357, 360-61 (3rd Cir. 1972) ("The

Railroad's argument overlooks the fact that a customer who is truly damaged by a railroad's breach of its shipping contract, whether the breach be intentional or not, receives no 'rebate' when the railroad pays it for the amount of its loss.")

The Ninth Circuit correctly concluded that this case does not involve rates, rate-setting, or practices or privileges affecting charges specified in AT&T's tariff. The filed rate doctrine therefore does not apply

4. Finally, the filed rate doctrine does not preempt COT's common law claims because the right to prove such claims is specifically preserved by the savings clause of the FCA, 47 U.S. C. § 414. It provides:

> Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

Nader interpreted a similar savings clause as preserving a passenger's common law claim for fraud based on an airline's failure to disclose its overbooking practices. On the basis of 47 U.S.C. § 414 and the Nader decision, courts have held that common law claims asserted against telecommunications carriers are not preempted by the FCA. See, e.g., In re Long Distance Telecommunications Litigation, 831 F.2d 627, 633-64 (6th Cir. 1987); Financial Planning Institute, Inc. v. American Tel. & Tel. Co., 788 F. Supp. 75, 77 (D. Mass. 1992); Cooperative Communications, Inc. v. AT&T Corp., 867 F. Supp. 1511,

1516 (D. Utah 1994); ("[I]nclusion of the savings clause clearly indicates Congress' intent that independent state law causes of action, such as interference with contract . . . not be subsumed by the Act, but remain as separate causes of action.").

Judge Brunetti, who authored the dissent in the Ninth Circuit's decision below, reached the same conclusion in Allarcom Pay Television, Ltd. v. General Instrument Corp., 69 F.3d 381 (9th Cir. 1995). There, the defendants raised express and implied preemption under the FCA as a defense to claims for interference with contract and with prospective economic advantage. In rejecting this defense, Judge Brunetti relied on a savings clause within the FCA substantially similar to the savings clause at issue here. He concluded that there was no preemption because allowing the state law claims would not impose obligations inconsistent with the FCA, nor would it frustrate any congressional objective. 69 F.3d at 387.

If the language and intent of the FCA itself did not permit exclusion of the claims at issue in Allarcom, particularly where an express preemption clause was involved, it logically follows that the judicially-created filed rate doctrine should not bar such claims. Allowing such claims would not create obligations inconsistent with the FCA. To the contrary, as Judge Brunetti stated in Allarcom, "[t]he obligations imposed under state law causes of action for unfair competition, interference with contract, and interference with prospective economic advantage are in addition to FCA obligations." 69 F.3d at 386.

5. One additional point needs to be made, to correct a misimpression that has been conveyed by AT&T. The filed rate doctrine is not threatened by the Ninth Circuit's decision in this case. The Ninth Circuit's decision in this case is consistent with the doctrine, for the reasons stated above. Rather, the filed rate doctrine is today almost extinct because the body of law that gave rise to the doctrine is rapidly disappearing. The dissent in Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 138, 110 S. Ct. 2759 (1990), recognized this trend nearly eight years ago.[6]

Specifically with respect to this case, the Telecommunications Act of 1996 was enacted on February 8, 1996. Pub. L. 104-104, 110 Stat. 56. Under its provisions, the entire field of telecommunications law is being transformed, including as to tariffs.

Section 401 of the Telecommunications Act of 1996 (Pub. L. 104-104 § 401, 110 Stat. 128-129), adding Section 160(a)(1) to the FCA (47 U.S.C. § 160(a)(1)), requires the FCC to forbear from applying any regulation or any provision of the FCA to a telecommunications carrier if the FCA determines that (1) enforcement is not necessary to ensure that charges, practices, classifications or regulations by the carrier are just and reasonable, (2) enforcement is

[6] "[T]he majority fails to appreciate the significance of the 'sea change' in the statutory scheme that has converted a regime of regulated monopoly pricing into a highly competitive market. Even wearing his famous blinders, old Dobbin would see through the tired arguments the Court accepts today." 497 U.S. at 138 (Stevens, J., dissenting).

not necessary for the protection of consumers, and (3) forbearance is consistent with the public interest. In its Policy and Rules Concerning the Interstate Interexchange Marketplace (CC Docket No. 96-61), FCC 96-424 (rel. October 31, 1996), 61 Fed. Reg. 59340 (November 22, 1996)(the "Detariffing Order"), the FCC ordered non-dominant interexchange carriers to cancel all tariffs for interstate, domestic, interexchange services currently on file with the FCC, and prohibited nondominant interexchange carriers from filing tariffs for such services in the future. 61 Fed. Reg. at 59353.[7] The FCC states as follows in support of the Detariffing Order:

> We find that a regime without nondominant interexchange carrier tariffs for interstate, domestic, interexchange services is the most procompetitive, deregulatory system. Specifically, we find that not permitting nondominant interexchange carriers to file tariffs with respect to interstate, domestic, interexchange services will enhance competition among providers of such services, promote competitive market conditions, and achieve other objectives that are in the public interest, including eliminating the possible invocation of the filed rate doctrine by nondominant interexchange carriers, and establishing

[7] Previously on October 23, 1995, the FCC issued an order granting AT&T's motion to be reclassified as a nondominant carrier. Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, FCC 95-427 (rel. October 23, 1995), recon. pending.

> market conditions that more closely resemble an unregulated environment. Moreover, we find that permitting non-dominant interexchange carriers to file tariffs on a voluntary basis would undermine several of these benefits, and therefore is not in the public interest.[8]

61 Fed. Reg. at 59349 (emphasis added).

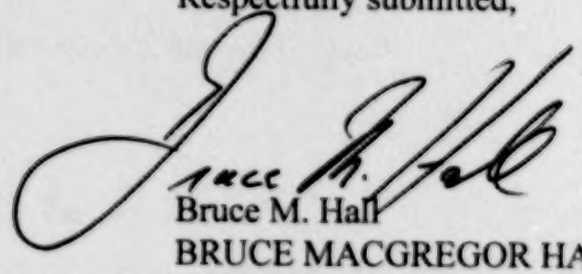
In short, the "century of decisions" on the filed rate doctrine relied upon by AT&T is about to become ancient history. The FCC wants to eliminate tariffs for non-dominant telecommunications carriers, and Congress has enacted a statute that allows the FCC to do so under circumstances the FCC now believes to exist.

[8] MCI Telecommunications Corp., joined by AT&T, has obtained a stay of the mandatory detariffing portion of the Detariffing Order pending judicial review of the order. MCI v. FCC, No. 96-1459 (D.C. Cir. Feb. 13, 1997). App. 3 - 43.

CONCLUSION

For the reasons given above, AT&T's petition for a writ of certiorari should be denied.

Respectfully submitted,



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APPENDICES

FILED 94 JUN 27

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

CENTRAL OFFICE TELEPHONE, INC., Plaintiff,	) Civil No. 91-1236-JE
AMERICAN TELEPHONE & TELEGRAPH COMPANY, Defendant.	) VERDICT

We, the jury, being duly empaneled and sworn to try the issues in this case, return our verdict as follows:

1. On plaintiff COT's claim for Breach of Contract we find:

(✓) In favor of plaintiff COT.

____ In favor of defendant AT&T.

2. On plaintiff COT's claim for Intentional Interference with business relations we find:

(✓) In favor of plaintiff COT.

_____ In favor of defendant AT&T.

If you find in favor of COT on either of the above claims, answer question 3.

3. Damages are awarded to COT against AT&T in the amount of $(13,000,000.00)

* * * * * * * * * * * * * *

4. On defendant AT&T's counterclaim, we find:

_____ In favor of AT&T, and award damages in the amount of $_____.

(✓) In favor of COT.

Dated this (29th)of June, 1994.

(Linda C. Fitz-Armstrong)
Presiding Juror

FILED JAN 6 1997

In The
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MCI TELECOMMUNICATIONS CORPORATION, Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	)	No. 96-1459

MOTION FOR STAY PENDING JUDICIAL REVIEW AND FOR EXPEDITED CONSIDERATION AND A BRIEFING SCHEDULE

MCI Telecommunications Corporation ("MCI") requests that this Court stay the portions of the Second Report and Order ("Order") issued by the Federal Communications Commission ("FCC") in Policy and Rules Concerning the Interstate Interexchange Marketplace, CC

Docket No. 96-61, released October 31, 1996, 61 Fed. Reg. 59,340 (Nov. 22, 1996) (copy attached at Tab A), which prohibit nondominant interexchange carriers from filing tariffs for domestic interstate interexchange common carrier services. MCI also requests that this Court expedite its review of the Order and establish a briefing schedule.

MCI requests this relief because the Order totally transforms the nature of customer-carrier relationships in the interexchange market in a way that will impose enormous costs and generate widespread, debilitating confusion about the laws and rules that will govern those relationships. Specifically, the Order eliminates all domestic tariffs, and requires carriers to establish individual contractual relationships with each and every customer of all domestic services. Indeed the Order eliminates tariffs even for customers with whom it will be impossible to form

contracts -- so-called casual callers who are not presubscribed to a carrier's service.

For carriers such as MCI, the cost of moving from tariffs to contracts for all domestic customers will be enormous. See Affidavit of Victoria Harker, January 6, 1997, ¶¶ 4-11 (attached at Tab B) (detailing costs of compliance). At the same time, the legal status of those newly formed contractual relationships will remain in substantial doubt during the pendency of appellate review. The Order itself generates substantial confusion as to whether the terms of these contractual relationships are governed by the substantive requirements of federal law (47 U.S.C. §§ 201, 202) (as the Order in some places suggested) or the requirements of state law (as the Order elsewhere suggests). At a minimum, there is likely to be a

plethora of litigation contesting the adequacy of the process of contract formation with MCI's millions of customers.

Should the Order be invalidated, the carrier-customer relationship will once again be governed exclusively by tariff. Individual contracts (principally with large business customers) with rates that differ from the tariffed rates will presumably be invalid and potentially unlawful. Thus, a second wave of litigation is likely in the event the Order is invalidated. Because the Order works so fundamental a change in prevailing law and practice -- and imposes such enormous cost and uncertainty -- its implementation should await a final determination of its validity.

A stay to prevent these harms is particularly warranted because the Order fails to provide anything approaching a sufficient justification for eliminating tariffs.

Section 203 of the Communications Act requires interexchange carriers to file tariffs with the FCC. 47 U.S.C. § 203(a). The FCC invokes § 402 of the Telecommunications Act of 1996, (codified at 47 U.S.C. § 10) as authority to forbid the filing of such tariffs. But this provision cannot support mandatory detariffing. While that provision may give the FCC authority to refrain from enforcing § 203's tariff requirements, it does not authorize the further step of affirmatively prohibiting carriers from filing tariffs should they wish to do so.

Moreover, even if the FCC did have the authority to forbid tariff filings, none of the rationales advanced by the FCC provides a reasoned basis for doing so. The FCC's principal rationale -- that eliminating tariffs will minimize collusion and price-signalling in the interexchange market -- is entirely undermined by a requirement imposed

elsewhere in the Order that carriers make the same information about rates, terms and conditions available to the public at the carriers' offices. see Order ¶¶ 59, 85. Thus, all the FCC has done is change the location where this information is available to the public.

The other rationales offered by the FCC likewise cannot support mandatory detariffing. The Order asserts that mandatory detariffing promotes rapid efficient responses to changes in demand and cost, eliminates costs on carriers seeking to offer new services, and allows consumers to seek out new arrangements tailored to their individual needs. Order ¶ 53. But all of these alleged benefits could have been achieved by permissive detariffing (which MCI, other carriers, consumer groups, and NARUC advocated to the FCC), with none of the costs imposed by

mandatory detariffing. Thus, none of these rationales justifies the choice of mandatory detariffing.

Immediate relief is needed. As of its effective date of December 22, 1996, the Order forbids carriers from filing any new tariffs or amending existing tariffs for long-term customer arrangements. Order ¶ 90. Prior to the Order's effective date, MCI filed approximately 300 such tariffs each month. Thus, the Order is having significant disruptive effects now which fully justify a stay. Furthermore, the Order requires replacement of all domestic tariffs with individual contracts by no later than September 22, 1997 (nine months after its effective date). Because the process of converting tens of millions of individual customers from contract to tariff will take months, that process will have to commence soon. See Harker Aff. ¶ 3. It is extremely unlikely that briefing,

argument and a final decision from this Court can be completed before all carriers will have to undertake that burden. Therefore, a stay of the entire Order is fully justified.

Additionally, because the public interest (as well as the interests of MCI and other carriers) will be greatly served by a swift final resolution of this matter, MCI respectfully requests a briefing schedule that would permit a final decision to be rendered no later than June 1, 1997.

STATEMENT

The FCC's Notice of Proposed Rulemaking proposed that the FCC would exercise its authority under Section 10 of the Telecommunications Act of 1996 to forbear from enforcing Section 203 of the Act, which requires carriers to file with the Commission schedules of charges (and classifications, practices and regulations

affecting such charges).[1] The FCC identified two alternatives: "permissive detariffing," a rule which would permit but not require carriers to file tariffs; or "mandatory detariffing," a rule which would prohibit carriers from filing tariffs altogether.

In its comments, MCI advocated permissive detariffing and vigorously opposed mandatory detariffing. MCI was joined in this position by other carriers (including AT&T), consumer groups, and NARUC. Comments filed by these parties demonstrated that mandatory detariffing would impose significant costs on carriers and their customers, with no countervailing benefits that could not equally be achieved through permissive detariffing. The

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[1] Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 12934, as amended, CC Docket No. 96-61, Notice of Proposed Rulemaking, 11 FCC Rcd. 7141, released March 25, 1996 ("Notice").

record showed that mandatory detariffing, especially as applied to services offered to residential and small business customers, would impose enormous transaction costs on carriers and their customers, and could preclude "casual" calling altogether.[2]

The FCC nevertheless chose "mandatory detariffing." The FCC concluded that such a policy would prevent carriers from invoking the filed rate doctrine, and protect consumers by allowing them "to pursue remedies under state consumer protection and contract laws." Order ¶ 55. The FCC also found that mandatory detariffing would likewise "preserv[e] the reasonable commercial expectations" of carriers (id.). The FCC claimed that tariffs are not "the only feasible way for carriers to establish legal

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[2] See AT&T Reply Comments, CC Docket No. 96-61, filed May 24, 1996, at 3 (citing comments of other parties).

relationships with their customers" (id.); that nondominant carriers would "not necessarily" need to negotiate contracts for service with each individual customer (id.); and that carriers could, for example, issue "short standard contracts" that contained basic rates, terms and conditions and "cross-referenced" other documents (id.). The FCC also stated that it was "not persuaded that detariffing will make casual calling impossible," and that "carriers have other options to establish legal relationships" for such calling (id., ¶ 58). The FCC therefore ordered nondominant carriers to cancel their tariffs for domestic, interstate services as of nine months from the Order's effective date. In addition, the FCC prohibited nondominant carriers from filing new or revised tariffs for long-term service arrangements (¶ 90).

MCI sought a stay of the Order from the FCC on December 18, 1996. Consumer groups, including the

Consumer Federation of America and the Telecommunications Research and Action Center, supported MCI's stay request. To date, the FCC has not ruled on that request.

ARGUMENT

A stay should be granted where 1) the movant is likely to prevail on the merits of the appeal; 2) the movant will likely suffer irreparable harm absent a stay; 3) others will not be harmed if a stay is issued; and 4) the public interest will not be harmed. See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977)).

"The test is a flexible one." Population Institute v. McPherson, 797 F.2d 1062, 1078 (D.C. Cir. 1986). Relief should be granted if a movant demonstrates "either a high likelihood of success and some injury, or vice versa." Id.,

citing Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985). An "absolute certainty of success" on the merits is not required. Id. Indeed, a stay should issue "even though [the Court's] approach may be contrary to movant's view on the merits," as long as the movant makes a substantial showing on the other factors. Washington Metropolitan Area Transit, 559 F.2d at 843.

Similarly, expedited review is appropriate where (i) the decision under review is subject to substantial challenge, and (ii) petitioners would suffer irreparable injury absent expedition. Handbook of Practice and Internal Procedures at 70, United States Court of Appeals for the District of Columbia Circuit. An additional, independently sufficient factor is whether "the public

generally . . . ha[s] an unusual interest in prompt disposition." Id.

Each of the criteria for a stay and for expedited review is easily satisfied here.

I. MCI IS LIKELY TO PREVAIL ON THE MERITS.

The principal legal issue in this case is whether the FCC properly exercised its authority under the new § 10 of the Communications Act, 47 U.S.C. § 10, to eliminate tariffs for all domestic interexchange services. Section 10 provides that the FCC may "forbear" from enforcing substantive requirements of the Communications Act if:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.

47 U.S.C. § 10(a).

As will be shown, the order cannot be justified under § 10 for two reasons. First, the FCC's decision to impose mandatory (rather than permissive) detariffing goes beyond the limited authority conferred by § 10. Second, the FCC's decision that mandatory detariffing is consistent with the public interest lacks any reasoned foundation, and is thus arbitrary and capricious.

A. The Order Exceeds The FCC's Statutory Authority.

Section 10 confers upon the FCC the limited power to "forbear from applying any regulation or any provision" of the Act if particular conditions are met. § 10(a). In the

Order, however, the FCC went much further and adopted a mandatory detariffing policy which prevents carriers from complying with the § 203 tariffing requirement, regardless of the nature of the service, or the type of customer involved.

The word "forbear" has an ordinary, well-understood meaning: "refraining from action." See Black's Law Dictionary 329 (5th ed. 1983); Webster's Third International Dictionary 886 (1981) (same); Random House Dictionary 748 (2d Ed. 1987) (same). Thus, Congress gave the FCC only the authority to refrain from enforcing the mandates of the Act, including § 203's requirement that carriers must file tariffs. Congress did not give the FCC authority to prohibit carriers from relying on tariffs to order their affairs, especially with the millions of small customers

whose relationship with interexchange carriers is entirely premised on tariffs.

Acknowledging that its order goes far beyond the ordinary meaning of "forbear," the FCC argues that the term should be interpreted in accordance with the FCC's traditional use of word, which assertedly covers mandatory as well as permissive detariffing. See Order ¶ 71. When construing a statute, however, it must be assumed that the "legislative purpose is expressed by the ordinary meaning of the words used." Richards v. United States, 369 U.S. 1, 9 (1962). Thus, "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1982). In this case, the ordinary meaning of the language at issue is not broad enough to encompass the FCC's reading. Nor

is there anything to indicate that Congress intended the language to mean anything other than what it ordinarily means. Thus, there was no statutory basis for the FCC's decision.

B. The Order Is Arbitrary and Capricious.

Quite apart from the absence of statutory authority, the Order lacks a reasoned justification. Indeed, the Order is hopelessly contradictory, and does not satisfy the requirement that agency action represent "a 'rational connection between the facts found and the choice made.'" Motor Vehicles Association Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co., et al. 463 U.S. 29, 43 (1983), quoting Burlington Truck Lines v. U.S., 371 U.S. 156, 168 (1962).

The Order rests principally on the FCC's conclusion that mandatory detariffing satisfied the "public interest"

prerequisite to forbearance (§ 10(a)(3)), because any tariffing facilitates "price coordination in the interstate, domestic, interexchange market . . ." Order ¶ 44; see also Order ¶ 54 ("tacit coordination of prices for interstate, domestic, interexchange services, to the extent it exists, will be more difficult if we eliminate tariffs, because price and service information about such service provided by nondominant interexchange carriers would no longer be collected and available in one central location"). The FCC likewise relied on this rationale in finding that § 10's other prerequisites were met. See, e.g., Order ¶ 23 (discussing whether tariffs are necessary to ensure that charges are just, reasonable, and non-discriminatory, and finding that tariff filings "facilitate, rather than deter, price coordination, because under a tariffing regime, all rates and service information is collected in one, central location"); id. ¶ 37

(discussing whether tariffs are necessary to protect consumers, and finding that "'forbearance will promote competition and deter price coordination, which can threaten competitive benefits'"); id. ¶ 41 ("we believe that eliminating tariffs . . . will reduce [carriers'] ability to engage in tacit price coordination").

Indeed, the FCC justified its choice of mandatory as opposed to permissive detariffing (or true forbearance) based on the view that permissive detariffing "would not eliminate the collection and availability of rate information in one centralized location," and "would create the risk that carriers would file tariffs merely to send price signals and thus manipulate prices." Order ¶ 61.

Mandatory detariffing simply cannot be justified on this ground. To begin with, the FCC did not find that tariffs caused price coordination. Rather, it acknowledged

that "evidence of tacit price coordination in the market for interstate, domestic interexchange services is inconclusive." Order ¶ 23. More importantly, even if the risk of price coordination were real, the Order would do nothing to ameliorate it. The Order identifies tariffs as the means by which competitors can ascertain pricing information. Yet the FCC ordered carriers to continue to "make information on current rates, terms, and conditions for all of their interstate, domestic, interexchange services available to the public in an easy to understand format and in a timely manner." Order ¶ 84 (emphasis added). Indeed, the Order requires carriers to publicize the location and hours during which such information may be accessed. Order ¶ 86.

Thus, the order requires fully as much public disclosure of rates, terms and conditions as does the tariff regime it displaces. If disclosure risks price signalling and

collusion, that risk remains present despite the FCC's decision to detariff. The Order simply will not bring about the principal public policy benefit the FCC claims it will achieve. The only difference between the tariff requirements of § 203 and the public disclosure requirements of the Order is the location of the information. Pursuant to § 203, the information is located at the FCC. Pursuant to the Order, it is available at the carrier's offices. It is inconceivable that this difference could prevent the risks of collusion identified by the FCC. Certainly, such a dramatic and costly policy shift as mandatory detariffing cannot be supported by so slender a reed.

Nor do any of the other rationales articulated in the order survive scrutiny. The Order cannot be justified on the ground that tariffing "removes incentives for competitive price discounting." Order ¶ 53. According to the Order,

carriers will not bother to offer discounts because competitors will know immediately what discounts are offered and will match them before the discount has the effect of attracting new customers. See id. ¶ 45. This assumption is, however, contrary to the record. The FCC itself recognized that the "high churn rate among consumers of interstate, domestic interexchange carriers indicates that consumers . . . are likely to switch carriers in order to obtain lower prices or more favorable terms and conditions." Order ¶ 21. This rationale also suffers from the same fundamental problem discussed above -- if tariffing did provide a disincentive to offer discount programs because other carriers would learn of them and immediately match them, the Order's disclosure requirements would merely perpetuate the problem.

Nor can the Order be justified on the ground that tariffing precludes carriers from making rapid, efficient responses to changes in demand and costs. Order ¶ 53. This conclusion is inexplicable. Under the existing rules, carriers can file tariffs on one day's notice,. This allows them to alter service plans almost instantaneously in response to competition or other changes in the market. The Commission itself found, however, that in a non-tariffed world, carriers would, at a minimum, be required to provide some form of advance notice to the millions of consumers they serve before certain changes could be made to rate structures. See Order ¶ 56 (Carriers would "likely be required, as a matter of contract law, to give advance notice of" changes such as rate increases). Thus, the move from tariff to contract is certain to reduce carriers' flexibility -- not enhance it. In any event, this benefit could

have been fully achieved by adopting a permissive detariffing rule, which would allow carriers to decide when the cost of tariffing outweighed its administrative benefits.

The FCC also indicated that tariffing imposes costs on carriers that attempt to make new offerings, and that mandatory detariffing is therefore in the public interest. But absent tariffs, carriers will have to enter into new contracts with customers each time they make a new offering. The cost of doing so, which the Commission appears not to have considered, will far outstrip the cost of tariff filings. And, once again, this benefit could have been fully achieved by adopting a permissive detariffing rule.

Finally, the FCC made no serious attempt to deal with the issue of "casual calling." Casual callers are those who use a carrier's services without having an ongoing relationship with that carrier, such as credit card and collect

callers. Carriers cannot enter into contractual arrangements with casual callers prior to the time the call is actually made. Under a tariffed regime, that is not a problem -- the rates charged for calling card or collect calls, as well as the terms and conditions governing those calls, are contained in tariffs, and both the carrier and casual callers are bound by the tariff. Absent tariffs, however, there is no mechanism available to govern the rates, terms and conditions of the call. The FCC's offhand comment that by using a credit card and completing a call, "casual callers may be deemed to have accepted a legal obligation to pay for any such service rendered," Order ¶ 58 (emphasis added), does not begin to answer the question of what, as a legal matter, obligates these callers to pay carriers a specific rate for the services they use; what terms and conditions, such as

applicable liability limitations, govern the call; and what law answers these questions.

In short, the FCC's order does not survive even minimal scrutiny.

II. MCI AND OTHERS WOULD SUFFER IRREPARABLE HARM IF THE MANDATORY DETARIFFING ORDER IS NOT STAYED.

The Order mandates radical change in the way MCI and all other interexchange carriers do business. Presently, as a result of the Supreme Court's ruling in MCI Telecommunications Corp. v. AT&T, 113 S. Ct. 2223 (1994), all of MCI's domestic services to millions of customers are provided under tariff. During the period when the Commission's rules authorized permissive detariffing, the vast majority of MCI's customers received service under tariff because it was far more efficient to do so than to enter into individual contracts with each

customer. The Order will require MCI to establish individual contractual relationships with each of these customers, and to do so in a matter of months. That process risks irreparable harm to MCI in at least four distinct ways.

First, (as detailed in the Harker affidavit submitted herewith) the cost of compliance with the Order will be enormous. MCI alone is likely to incur costs that run to tens of millions of dollars even to establish contracts using standardized forms with its millions of customers and every other interexchange carrier would be put to the same expense. Specifically, MCI estimates that it will incur an expense of approximately $20 million in transaction costs to convert existing customers to contracts, and approximately the same amount to form contractual relationships with the approximately 16 million new

subscribers MCI estimates it will obtain in 1997. Harker Aff. ¶ 6. MCI also estimates that the need to use mailings rather than tariff amendments to effectuate changes in terms and conditions will cost approximately $48 million annually. Id. ¶ 7. MCI further estimates that customer support services for this conversion process will be approximately $11 million. Id. ¶ 8.

This harm is certain to occur imminently. Absent a stay, MCI will be required to begin the process of converting customers from tariffs to individual contracts in a matter of months in order to meet the Order's September 22, 1997 deadline for the complete elimination of tariffs. Harker Aff. ¶¶ 1, 5. Should the Order be invalidated, that expense would have been wholly unnecessary. Indeed, invalidation of the Order would impose on MCI a further cost of informing all its customers

that the contracts they previously received were no longer valid. Because these harms are both certain and great, they plainly warrant a stay. See Wisconsin Gas Co. v. FERC, 758 F.2d 669 (D.C. Cir. 1978). Furthermore, the harms are certain to fall on MCI (and other carriers) or their customers, or (as is most likely) both; In all likelihood MCI will be forced to absorb a substantial measure of the costs but higher rates for consumers will also result. Harker Aff. ¶ 11.

Second, the process of replacing tariffs with contracts will expose MCI and other carriers to an onslaught of litigation. To begin with, the Order has created tremendous uncertainty as to whether customer-carrier relationships will continue to be governed by uniform federal law, or will instead be governed by state law. On the one hand, as the Order makes clear, the

substantive requirements of §§ 201 and 202 of the Communications Act that interstate rates be just, reasonable and nondiscriminatory continue to apply, and will be enforced by the FCC in complaint proceedings authorized by § 208 of the Act. On the other hand, the Order repeatedly suggests that state contract and consumer protection law will henceforth govern carrier-customer relationships. E.g. Order ¶ 42.

The process of contract formation will itself raise many complicated questions. Under the law of many states, it is unclear whether MCI can form contracts with existing customers by virtue of a process that makes new contract terms binding if a customer continues to use MCI after receiving notice of the contract terms. Such a practice may be deemed an unlawful "negative option," necessitating that MCI terminate service and then restore it

only to customers who affirmatively request it. Many other unresolved questions about the scope of MCI's new state law duties will likewise be certain to prompt massive consumer class action litigation. MCI and other carriers should not be subjected to this burden in advance of a conclusive determination of the Order's validity.

Third, as demonstrated, the Order will prevent MCI from entering into contracts with a substantial class of customers -- casual callers -- which will severely disrupt an important aspect of its business.

Fourth, denial of a stay will cast a pall of uncertainty over the market, particularly with respect to large and mid-sized businesses with which MCI typically enters into special customer arrangements (SCAs). During the pendency of the appeal, it will remain unclear whether existing tariffed SCAs can continue to govern those

relationships, or whether existing SCAs must be renegotiated. It will be unclear whether the meaning and enforcement of the SCAs will be governed by federal or state law, and if the latter, which state's law. Because the Order forbids the filing of any new SCAs as of its effective date (¶ 90), all such relationships formed during the pending of the appeal will have to be contractual. Should the Order be invalidated, however, these contractual relationships could be found to be without legal effect. See American Broadcasting Companies, Inc. v. FCC, 643 F.2d 818 (D.C. Cir. 1980). Customers may refuse to pay, or, if they pay at all, may raise subsequent claims based on the statutory requirements of § 202(a) that rates be nondiscriminatory. Carriers would suffer enormous adverse consequences were they required to shift to contractual relationships en masse during the pendency of

the appeal, only to shift back to tariff relationships should they prevail.

III. NO OTHER PARTY WOULD HARMED BY THE GRANT OF A STAY.

No other party would be substantially harmed by the grant of a stay. The relationship between consumers and carriers has been governed by tariffs for over sixty years. For that same sixty years, the FCC has accepted and maintained tariff filings. It cannot seriously claim that it or the public would be harmed merely by maintaining the status quo -- a status quo mandated by the Communications Act -- until the question of the Order's lawfulness can be decided on the merits.

IV. THE PUBLIC INTEREST WOULD BE SERVED BY THE GRANT OF A STAY.

The public interest would be served by the grant of a stay. As discussed above, implementation of the Order

would impose significant costs on carriers that would likely be passed on to consumers. A stay preserving the status quo would prevent the confusion and added expense consumers may suffer if carriers are forced to move toward a detariffed environment -- confusion and expense which would be utterly needless if the Order is overturned on the merits. That is doubtless why an array of groups representing consumers supported MCI's request for a stay from the FCC.

CONCLUSION

For all the reasons stated above, the Order should be stayed pending review by this Court, and an expedited schedule should be established.

Respectfully submitted,

- S -

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Dated: January 6, 1997

United States Court of Appeals
For The District of Columbia Circuit

No. 96-1459 September Term, 1996

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
FILED FEB 13 1997

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents.

Competitive Telecommunications Association, et al.,
Intervenors

Consolidated with 96-1477, 97-1009

BEFORE: Ginsburg, Sentelle, and Tatel, Circuit Judges

APPENDIX C

ORDER

Upon consideration of MCI Telecommunications Corporation's motion for stay pending judicial review and for expedited consideration and a briefing schedule, the responses thereto, the replies, and the supplements; America's Carriers Telecommunication Association's motion for stay pending judicial review, the response thereto, and the reply; and the motion to hold in abeyance, the responses thereto, and the reply, it is

ORDERED that the motions for stay be granted. Petitioners have satisfied the stringent standards required for a stay pending court review. See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); D.C. Circuit Handbook of Practice and Internal Procedures 68-69 (1994). It is

FURTHER ORDERED that the motion to hold in abeyance be denied. It is

FURTHER ORDERED that the motions for expedition be granted in part. The Clerk is directed to calendar this case for oral argument early in the September 1997 Term. It is

FURTHER ORDERED, on the court's own motion, it appearing that these consolidated cases present potential problems of duplicative briefing, that the parties show cause within fifteen days of the date of this order why the following briefing format should not be adopted:

Joint brief of petitioners
(not to exceed 12,500 words)

Joint brief of intervenors in support of
petitioners (not to exceed 8,750 words)

Brief of respondents
(not to exceed 12,500 words)

Joint brief of intervenors in support of
respondents (not to exceed 8,750 words)

Joint reply brief of petitioners
(not to exceed 6,250 words)

Joint reply brief of intervenors in support of
petitioners (not to exceed 6,250 words)

The foregoing represents a *proposed* format. Those parties with no objection to it need not respond. Any responses to the order to show cause shall not exceed 20 pages. Objections to the format should be detailed and specific. The parties may also suggest an alternative briefing format to reduce the number of pages submitted to the court. In so doing, the parties should keep in mind that the court looks with extreme disfavor on repetitious submissions and will, where appropriate, require joint briefs.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: - S -
MaryAnne McMain
Deputy Clerk/LD

(4)

No. 97-679

Supreme Court, U.S.
FILED
NOV 28 1997
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

AT&T CORP.,
Petitioner,

v.

CENTRAL OFFICE TELEPHONE, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

AT&T seeks review and summary reversal of the Ninth Circuit decision that common carriers can be held liable under state law for breaching alleged oral or implied promises to provide faster or better service than is required by their tariffs. A majority of a divided panel of the Ninth Circuit concluded that these state law claims are not foreclosed by the statutory filed tariff requirements because it held that those requirements (1) apply only to rates and (2) in any event, allow enforcement of "side" agreements that address provisioning and other matters that are claimed not to be covered by the tariff. Pet. 10a-11a.

That this holding should be reviewed—and summarily reversed—has been vividly confirmed by the *amicus curiae* brief that has been filed on behalf of the local telephone industry by Southwestern Bell Telephone Company, Pacific Bell, and the United States Telephone Association ("USTA"), which is the trade association of the more than 1,000 incumbent local telephone companies (and of which AT&T is not a member).[1] It demonstrates that the Ninth Circuit's holdings on their face violate literally a century of this Court's decisions and that, unless reversed, the Ninth Circuit's decision will wreak havoc on the regulatory regime that has governed—and will continue to govern—the telecommunications industry and many other regulated industries as well.

More tellingly, even the opposition of respondent Central Office Telephone ("COT") does not defend the Ninth Circuit's holdings, but renounces them. In particular, contrary to its arguments successfully urged before the Ninth Circuit,[2] COT now concedes (1) that the filed tariff doc-

[1] *See* Brief *Amici Curiae* of the United States Telephone Association, Southwestern Bell Telephone Company, and Pacific Bell in Support of the Petition for a Writ of Certiorari, No. 97-679. The mere submission of that brief puts to rest COT's assertion that the filed tariff doctrine is an issue of limited prospective importance.

[2] *See* Brief of COT, at 35-36 ("Because this case does not involve rates or rate-setting issues, the filed rate doctrine is inapplicable"); *id.* at 37 (side deals may "fill in gaps" in tariff as long as they are not inconsistent with the tariff).

trine is " 'not limited to rates *per se*' " (Opp. 10, *quoting Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 966 (1986)), and (2) that COT may not "enforce 'side deals' for services not covered by AT&T's tariff." Opp. 10. In this regard, COT acknowledges the century of decisions of this Court that hold that the statutory filed tariff requirements preempt state law claims of "a customer who paid one tariff rate while claiming services that were not required by the tariff." Opp. 13, *citing Chicago & Alton R. Co. v. Kirby*, 225 U.S. (1912); *Atchison, T. & S.F. Ry. Co. v. Robinson*, 233 U.S. 173 (1914); *Davis v. Cornwell*, 264 U.S. 560 (1924). *Accord Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 126, 130 (1990).

Accordingly, rather than defend the Ninth Circuit's actual holdings, COT seeks to defend the judgment by advancing a host of other theories that all rest on a single premise: COT's claim that AT&T was found not to have breached untariffed side agreements, but to have engaged in "willful misconduct" and discrimination, by failing to provide COT with the same tariffed services that large corporate customers receive. Opp. 8-14. As explained in detail below, these claims are meritless.

However, the short answer to COT is that these other theories were not the basis for the Ninth Circuit's decision. Because the Ninth Circuit's actual holdings are patently erroneous, are undefended by COT, and would subvert important national interests, the appropriate course is for this Court to grant certiorari, reverse the Ninth Circuit's decision summarily, and allow COT to pursue any of its other theories that are not otherwise foreclosed on remand. *See Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U.S. 533 (1983).

1. In light of the clarity of the Ninth Circuit's opinion on these issues, there can be no dispute about the actual grounds for its decision. Since enactment of the Communications Act, AT&T has been required to file tariffs with the Federal Communications Commission for all its inter-

state services. However, as the Ninth Circuit expressly stated, "COT's state law claims were based on COT's allegation that the contracts entered into with AT&T did not constitute the ordering of long distance pursuant to the requirements of AT&T's tariff, but rather constituted voluntary contracts" that "included all the understandings that COT's president had from reading service brochures and from talking with AT&T representatives." Pet. 5a-6a. This included the understanding that AT&T would provision new orders in 45 to 90 days. Pet. 5a. COT thus argued that while the billings and provisioning problems in its SDN service did not violate AT&T's tariff, they gave rise to three state-law claims: (1) they were a breach of the aforementioned "contract," (2) they violated AT&T's implied duty of good faith because they "undermined the purpose of th[at] contract," and (3) they constituted tortious interference with COT's business relationships because "any violation" of AT&T's "contractual duties [also] constituted tortious interference." *Id.*

As the petition showed, those claims are foreclosed by a century of this Court's decisions applying the filed tariff doctrine. *Maislin Indus.*, 497 U.S. at 126, 130. Those decisions hold that a carrier's filed tariff exclusively "governs the legal relationship between [customer] and carrier" and that "[t]he rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier." *Id.*; *see also, e.g., Kirby*, 225 U.S. 155; *Davis*, 264 U.S. 560.

The Ninth Circuit nonetheless rejected AT&T's claim "that all rights between AT&T and COT are governed by the tariff." Pet. 12a. The majority of the divided panel held that "[b]ecause this case does not involve rates or rate-setting, but rather involves the provisioning of services and billing under several contracts, the filed-rate doctrine does not apply." Pet. 10a. Alternatively, the majority held that the filed tariff doctrine does not prohibit side deals to supplement a tariff as to matters not contained in the tariff. Pet. 11a.

These are the holdings for which the case is now being cited and will hereafter be cited in litigation between carriers in regulated industries and their customers. In particular, these are the holdings that will be controlling authority in cases throughout the states of California, Alaska, Arizona, Hawaii, Montana, Nevada, Oregon, and Washington. And as the Petition and USTA's *amicus* brief demonstrate, critical national interests will be severely impaired if these holdings are not reversed.

2. However, while conceding that these holdings are erroneous and will defeat important federal policies in other cases, COT incongruously seeks to avoid review by urging alternative legal theories in this case. Its principal argument is that its claims were not barred by the filed tariff doctrine because COT made allegations of "willful misconduct" by AT&T. Opp. 8-10. COT notes that AT&T's tariff includes a provision declining to limit AT&T's liability for willful misconduct, and argues in any event that "willful misconduct claims are not precluded by the [filed tariff] doctrine." Opp. 9. However, the Ninth Circuit did not rely upon or even address this alternative argument. To the contrary, the Ninth Circuit *rejected* AT&T's claim that the magistrate had erred "by failing to instruct the jury that the only issue was whether AT&T violated its tariff through willful misconduct." Pet. 11a.

COT nonetheless suggests that the court's decision to remand the case for a trial on punitive damages implies that its decision to uphold the judgment was based on such a finding of willful misconduct. That is simply false. The case was remanded not because the jury had made such a finding of "willful misconduct," but because the Ninth Circuit held that under Oregon law, punitive damages are available if actual damages have been awarded for the tort of tortious interference with an economic relationship. *See* App. 19a (citing Oregon cases). And, as the Ninth Circuit explained, COT's tortious interference claim was entirely derivative of the breach of contract

claim, which rested on AT&T's breach of the alleged side deals, not on any willful violation of its tariff.

Moreover, as Judge Brunetti's dissent explained (Pet. 29a-30a), a "willful misconduct" theory could not have provided an alternative basis for the judgment below even if the majority had relied on it. First, the "willful misconduct" provision of AT&T's tariff is irrelevant here. That provision describes liability limitations when AT&T is charged with violating its tariff; it does not create a separate cause of action for allegations of generalized "bad acts" that do not violate the tariff. *See, e.g., Multi Communication Media Inc.* v. *AT&T Corp.*, 1997 U.S. Dist. LEXIS 5166 (S.D.N.Y. April 18, 1997) ("the willful misconduct clause merely assumes the enforceability of existing claims or defenses without creating new ones"). Where AT&T violates its tariff obligations non-willfully, any recovery by a customer is calculated pursuant to a formula dictated by Section 2.3.1 of the tariff. Pet. 54a. But if AT&T willfully violates its tariff, that limitation on liability is removed.[3] Because no tariff violations were alleged or found, this clause has no bearing on this case.[4]

Moreover, the supposed "willful misconduct" claimed by COT is AT&T's failure to implement the alleged side deals that would have given COT an illegitimate and discriminatory advantage over other customers. That is not "misconduct" at all, for AT&T is forbidden by the tariff-filing and nondiscrimination requirements of the Communications Act from implementing such side deals. That was the holding of *Maislin*, which set aside the Interstate Commerce Commission's attempt to define carriers' re-

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[3] *See, e.g., AT&T Corp.* v. *Cheek America Corporation*, 1997 U.S. Dist. LEXIS 7429, *7-8 (N.D. Ill. May 22, 1997) ("Customer may only recover consequential damages in cases where a common carrier's violation of the tariff is found to be willful").

[4] COT cites (Opp. 9) *Primrose* v. *Western Union Tel. Co.*, 154 U.S. 1 (1894), for the proposition that willful misconduct claims are not limited by tariffs or the filed tariff doctrine, but provides no specific citation. There is none.

fusal to implement untariffed side deals as "unreasonable practices" and thus unlawful. *See Maislin*, 497 U.S. at 131-32 n.12 ("this risk of intentional misconduct on the part of a carrier has always existed and has never been considered sufficient to justify a less stringent interpretation of [the statutory filed tariff doctrine]"). As the dissent below explained, such purported "willful misconduct" claims are foreclosed by this Court's precedents and would render the filed tariff doctrine "a nullity." Pet. 29a-30a (citing *Louisville & Nashville R. Co.* v. *Maxwell*, 237 U.S. 94 (1915) and *Kirby*, 225 U.S. 155).[5]

3. Similarly, COT tries (Opp. 10, 13) to reformulate its state law claims as discrimination claims, contending that it received poor treatment in comparison to AT&T's "favored corporate customers." Such discrimination is actionable under Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), but COT did not raise any claim under Section 202(a) in its complaint below and no such claim was litigated. Also, there was no validity to, or proof of, any such charge—or of the related allegation (Opp. 5-8) that AT&T had a scheme to disadvantage all resellers. Indeed, every jury and other tribunal to consider whether AT&T's conduct in providing SDN to resellers during this period was discriminatory has rejected this claim. *See* Pet. 4 n.1 (citing cases). In all events, because COT raised no such federal claim below, it obviously has nothing to do with the Ninth Circuit's decision on the state-law claims that COT did raise.

4. COT also seeks to rely on *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290 (1976), and its holding that the

[5] COT cites (Opp. 9) *MCI Telecommunications Corp.* v. *TCI Mail, Inc.*, 772 F. Supp. 64 (D.R.I. 1991), which held that willful misconduct claims could be made for violations of extra-tariff side deals. That case, however, expressly declined to follow the leading precedent on the point (*id.* at 66-68) and has been properly discredited: the case is "[t]he exception to the case law," and "[t]he analysis in *TCI Mail* . . . is precisely the type of analysis that was rejected by the Supreme Court in *Maislin*." *Fax Telecomunicaciones* v. *AT&T*, 952 F. Supp. 946, 955 n.6 (E.D.N.Y. 1996).

Federal Aviation Act did not preclude state law fraud claims against an airline for failing to disclose its practice of overbooking flights. Opp. 10-12. COT tries to bring this case within *Nader* by claiming that AT&T engaged in "willful misconduct" or "discrimination" that was "without disclosure." Opp. 11. But this, too, was manifestly not the basis for the Ninth Circuit's holding, and *Nader* was not cited below.

COT also claims that Nader establishes that "not everything" that a carrier does is "sufficiently related to rates to bar common law remedies," that the only relationship between its claims and AT&T's rates is that a damages award in COT's favor might cause AT&T to increase its rates, and that *Nader* holds this possibility to be insufficient to preclude a state law claim. Opp. 10, 11, 13.

This is simply wrong. While "not everything" a common carrier does must be tariffed, the Communications Act requires that its tariffs contain all "charges" and all "classifications, practices, and regulations affecting such charges." 47 U.S.C. § 203(a). As Judge Brunetti noted in dissent, "[t]o avoid being an empty letter, the filed rate doctrine must encompass both rates and the services corresponding to those rates," because "rates have no meaning unless tied to corresponding services." Pet. 20a, 21a.

Thus, the reason the common law claim was not barred in *Nader* is that it would have had no "impact" on rates if the airline had "adopted" the "practice" necessary to "avoid such liability" by *disclosing* the overbookings (as all airlines now do). 426 U.S. at 299-300.

By contrast, liability was imposed here because AT&T had not provisioned orders for service faster than its tariff required. Pet. 5a. The speed with which a carrier commits to installing a service affects the rate it will charge, and AT&T would have charged higher rates if it had committed to provision SDN service orders within a 45-90 day period. For this reason—and *not* because damage claims may be passed through to customers in higher rates—the Court held in *Kirby* and *Davis* that the filed tariff doctrine pre-

cludes damage claims for a carrier's alleged failure to implement side deals concerning the pace at which service would be provided. That is the same reason AT&T's responsibilities for provisioning and billing service were set forth in FCC tariff (*see* Pet. 54a-56a),[6] and that is the same reason *Davis* holds that the alleged untariffed side agreements would be nullities even if AT&T's tariff had not expressly addressed these subjects. 264 U.S. at 561-62; Pet. 14-15.

COT correctly describes *Kirby*, *Davis*, and *Atchison, T. & S.F. Ry. Co.* v. *Robinson*, 233 U.S. 173 (1914), as cases barring claims by customers "who paid one tariff rate while claiming services that were not required by that tariff" and thus, "[i]n effect, . . . sought to pay a lower rate." Opp. 13. But that is the precise claim the Ninth Circuit improperly upheld here. COT is therefore reduced to implying that those decisions are obsolete because they were decided "more than 50 years ago" and pre-date *Nader*. This is nonsense. *Nader* did not even address the filed tariff doctrine—the issue there was whether a case should be stayed pending a primary jurisdiction referral to the Civil Aeronautics Board—and certainly did not overrule that venerable doctrine. *See, e.g., Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990) (post-*Nader* case applying filed tariff doctrine).

5. In a related vein, COT also seeks to rely on the savings clause of Section 414 of the Communications Act, 47 U.S.C. § 414, which provides:

[6] COT misrepresents the facts when it contends (Opp. 6 n.1) that AT&T stated that billing services to its long distance customers are not covered by its tariff in *International Audiotext Network* v. *American Tel. & Tel. Co.*, 62 F.3d 69 (2d Cir. 1995). Tariffs always define the terms and conditions under which a carrier bills its own telephone customers. The "billing services" referred to in *International Audiotext* have nothing to do with the services at issue here. Those were commissions AT&T paid out of long distance revenues it collected from its customers to a firm that provided an information service to long distance customers. Unlike COT, that firm was not receiving any communications services from AT&T, and was not being billed by AT&T.

> Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

Once again, the Ninth Circuit did not rely on this theory, and with good reason.

Like much of the Act, Section 414 was copied from, and designed to have the same meaning as, the parallel provision of the Interstate Commerce Act which governed telecommunications before the Communications Act was passed.[7] Consistent with the usage under the Interstate Commerce Act and the demands of the filed tariff doctrine, this Court has long held that the savings clause preserves only those rights and claims that are "not inconsistent with" the statutory filed tariff requirements. *See Adams Express Co.* v. *Croninger*, 226 U.S. 491, 507 (1913).

The Act thus does not save, but preempts, state law claims of any variety that purport to require a carrier to provide service other than as described in the tariff. The Court made this undeniably clear in *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 448 (1907), and has consistently maintained that rule in *Kirby*, *Davis*, and a multitude of other decisions rejecting state law contract and tort claims like COT's as preempted, not saved.[8] COT can provide no authority from this Court to the contrary, and the cases on which it relies (Opp. 14-15) are readily distinguished. None presented a state law claim that a carrier should do what the filed tariff doctrine forbids, namely to provide service on more favorable terms than the tariff described.

[7] *See MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U.S. 218, 229-30 (1994).

[8] *See, e.g., Southern Pac. Transp. Co.* v. *Commercial Metal Co.*, 456 U.S. 336 (1982); *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981); *Western Union* v. *Nester*, 309 U.S. 582 (1940); *Davis* v. *Henderson*, 266 U.S. 92 (1924); *Western Union Tel. Co.* v. *Speight*, 254 U.S. 17 (1920); *Louisville & Nashville R.R.* v. *Maxwell*, 237 U.S. 94 (1915); *Primrose* v. *Western Union Tel. Co.*, 154 U.S. 1 (1894).

6. Finally, COT again claims, as it did below, that the filed tariff decisions of this Court—including some very recent decisions [9]—are "ancient history" because, COT claims, the FCC has eliminated the filed tariff requirement. Opp. 16-18. This claim is egregiously false. The FCC Order on which COT relies was stayed by the D.C. Circuit. But, even if this order were subsequently upheld, it applies only to a few of the telecommunications carriers (and none of the carriers in other industries) now subject to the filed tariff doctrine. *See* Pet. 18-19. And, even with respect to the small percentage of carriers who would be affected by the FCC order if it ever took effect, the Ninth Circuit's decision could still be applied in scores of cases relating to services provided during the period prior to that time.

The Ninth Circuit decision will apply in *all* cases involving the overwhelming majority of telephone carriers and other carriers who will continue to be required to file tariffs under the terms of this FCC order. These are the reasons why the Ninth Circuit's decision has prompted such concern, for example, on the part of the more than 1000 local telephone companies represented by the United States Telephone Association in its *amicus* brief in support of summary reversal. In any event, it is not for COT or the Ninth Circuit to overrule a "century" of this Court's precedents (*Maislin*, 497 U.S. at 130) as "ancient history."

CONCLUSION

For the reasons given above and in AT&T's petition for a writ of certiorari, this Court should summarily reverse the decision of the court of appeals, or, in the alternative, should grant the petition for a writ of certiorari.

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[9] *See, e.g., MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U.S. 218 (1994); *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990); *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U.S. 533 (1983).

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No. 97-679

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

AT&T CORP.,
Petitioner,
v.
CENTRAL OFFICE TELEPHONE, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE UNITED STATES TELEPHONE ASSOCIATION, SOUTHWESTERN BELL TELEPHONE COMPANY AND PACIFIC BELL IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37.2 of the Supreme Court Rules, United States Telephone Association ("USTA"), Southwestern Bell Telephone Company ("Southwestern Bell") and Pacific Bell respectfully move this Court for leave to file the accompanying brief of *amici curiae* in support of petitioner. Petitioner's counsel has authorized movants' counsel to represent that petitioner consents to the filing of this brief. Movants' counsel attempted to contact respondent's counsel, Bruce M. Hall, Esq., to request consent to the filing of this brief, but received no response. USTA, Southwestern Bell and Pacific Bell therefore are filing this motion.

USTA is the leading trade association for the local telephone industry in the United States. Founded a century ago, USTA represents over 1,000 small, mid-size and

large local exchange carriers ("LECs")—providers of local[1] telephone service—that operate more than 95 percent of the nation's total number of local access lines, including access lines in each state in the Ninth Circuit.[1] Southwestern Bell is a regional Bell Operating Company that provides local telephone service in Missouri, Kansas, Arkansas, Oklahoma and Texas. Pacific Bell is a regional Bell Operating Company that provides local telephone service in California. Both Southwestern Bell and Pacific Bell are members of USTA. USTA, Southwestern Bell and Pacific Bell frequently file *amici curiae* briefs in the federal courts of appeals and the United States Supreme Court on issues of vital concern to the local telephone industry, and USTA and Pacific Bell thus participated as *amici curiae* in the proceedings before the Ninth Circuit.

The Ninth Circuit majority's decision declining to apply the "filed tariff," or "filed rate," doctrine to respondent's claims is of great concern to USTA's members, including Southwestern Bell and Pacific Bell, since that doctrine applies not just to long distance carriers such as petitioner, but also to LECs. Like long distance carriers, LECs are statutorily required to provide services pursuant to tariffs on file with federal and state regulatory agencies. Allowing the lower court's decision to stand will seriously disrupt the provision of local telecommunications services and subject millions of local telephone customers in the Ninth Circuit to discriminatory pricing. USTA, Southwestern Bell and Pacific Bell have important interests in (i) ensuring the stability of the regulatory regime that has served carriers and customers well for many decades; (ii) preventing customers from asserting entitlements to rates or services that vary from the rates or services specified in a carrier's published tariffs; and (iii) promoting the key federal and state statutory requirements of uniform service and nondiscriminatory pricing. Thus, movants bring a broader perspective to the issues in this case than that presented by the parties themselves.

For the foregoing reasons, movants USTA, Southwestern Bell and Pacific Bell respectfully request that they be allowed to participate in this case and file the accompanying *amici curiae* brief in support of petitioner.

Respectfully submitted,

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November 17, 1997

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[1] Since petitioner is a provider of long distance services, it is not a member of USTA.

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INTEREST OF THE *AMICI CURIAE*

The interest of the *amici curiae* is set forth in the motion accompanying this brief.[1]

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's evisceration of the filed rate doctrine raises issues of national importance that warrant

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[1] Pursuant to Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

prompt review and summary reversal by this Court. For the reasons set forth in the petition, summary reversal is warranted in light of the Ninth Circuit's refusal to follow settled precedent of this court. If the decision is permitted to stand, it will destabilize long-settled relationships between hundreds—if not thousands—of telecommunications common carriers and millions of customers, sharply increase the costs of providing not only long distance but also local telecommunications services to U.S. consumers, and undermine fundamental regulatory goals and statutory requirements of uniform and fair treatment of consumers. The far-reaching and disruptive consequences of the Ninth Circuit's decision will harm carriers and consumers not just in the Ninth Circuit, but across the country.

For nearly 100 years, filed tariffs have been the cornerstone of the relationship between a regulated common carrier and its customers. Section 203(a) of the Communications Act of 1934 provides that "every common carrier . . . shall . . . file with the Commission and print and keep open for public inspection schedules showing all charges . . . and showing the classifications, practices, and regulations affecting such charges."[2] States have similar tariff-filing requirements. As this Court observed only three years ago, "[t]he tariff-filing requirement is . . . the heart of the common-carrier section of the Communications Act," since "rate filing was Congress's chosen means of preventing unreasonableness and discrimination in charges."[3] While the Telecommunications Act of 1996 gave the Federal Communications Commission ("FCC" or "Commission") the authority to forbear from requiring the filing of tariffs where the Commission determines that detariffing will promote competition,[4] and the FCC has considered exercising its authority to forbear from requiring the filing of tariffs for the provision of domestic long

[2] 47 U.S.C. § 203(a).

[3] *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 230 (1994) (citing cases).

[4] *See* 47 U.S.C. § 10.

distance services,[5] local telephone companies are not the subject of any pending detariffing action. Thus, *every single incumbent LEC in the country*—more than 1,300 carriers in all—remain fully subject to the statutory tariff-filing requirement at both the federal and local levels.

The filed rate doctrine has long made clear that carriers, such as the members of United States Telephone Association ("USTA"), including Southwestern Bell Telephone Company ("Southwestern Bell") and Pacific Bell, are absolutely forbidden to charge rates for their services other than those specified in the tariffs they have on file with the FCC or state public utility commissions, or to vary the terms of service in any way from the terms specified in their tariffs.[6] LECs and other common carriers thus file detailed tariffs specifying their rates and terms of service—rates and terms of service that apply in all states that a carrier serves in the case of FCC-filed tariffs and statewide in the case of tariffs on file with state public utility commissions—and the carriers are bound to adhere to those tariffs unless a regulatory agency finds them unreasonable. This bright-line rule has ensured the existence of reasonable and nondiscriminatory rates and services, avoided situations of unequal bargaining power between carriers and consumers, minimized unnecessary confusion on the part of both carriers and consumers, and given clear guidance to the carriers themselves as to the applicable statutory and regulatory requirements governing their operations. By declining to apply the filed rate doctrine to preempt the respondent's state law claims

[5] *See Policy and Rules Concerning the Interstate Interexchange Marketplace*, (CC Docket No. 96-61), *Second Report and Order*, 11 FCC Rcd 20730 (1996), *stayed on appeal, MCI Telecomms. Corp. v. FCC*, No. 96-1459 (D.C. Cir., Feb. 13, 1997), *recon.*, FCC No. 97-293 (Aug. 21, 1997).

[6] *See Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126 (1990); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981); *Keogh v. Chicago & N.R. Co.*, 260 U.S. 156, 163 (1922); *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94, 97 (1915).

based on alleged extra-tariff agreements relating to service provisioning, the Ninth Circuit has eviscerated the filed rate doctrine and thereby undermined the foundation on which federal and state common carrier regulation is based.

First and foremost, the Ninth Circuit's decision destroys the uniformity of rates and services that is the "paramount purpose" of the filed rate doctrine and the tariff-filing system itself.[7] Under the Ninth Circuit's decision, telecommunications carriers will remain obligated to file tariffs, charge and collect only the filed rate for the services they provide, and apply their tariffs universally without any discrimination whatsoever.[8] But USTA's members, including Southwestern Bell and Pacific Bell, and other carriers no longer will be entitled to rely on filed tariffs as the definitive statement of their rights, duties and liabilities with respect to the telecommunications services they provide to customers, and they will have no way to guarantee uniform service to all customers. To the contrary, any customer will be able to claim the existence of a "side deal" and obtain the non-uniform treatment that Congress clearly intended to prevent. Indeed, any inadvertent remark by a careless sales representative, or any description of a service published in a carrier's marketing materials, could provide a basis for a customer to manufacture a claim for special treatment.

Second, to the extent that individual customers succeed in enforcing agreements for extra-tariffed services, carriers no longer will be able to guarantee the provision of uniform, nondiscriminatory services to similarly situated customers, contrary to Congress' unambiguous mandate. Customers with varying degrees of bargaining power will obtain different rates and terms of service than the rates and terms of service available under a carrier's filed tariff.

[7] *See Maislin*, 497 U.S. at 126 (citing *Keogh*, 260 U.S. at 163).

[8] *See* 47 U.S.C. §§ 201-203.

Smaller customers thus effectively will subsidize those with greater resources who are able to obtain preferential treatment. As a result, customers who previously could rely on the certainty and predictability of receiving the rate and terms of service specified in tariffs filed with federal or state regulators no longer will have any assurance of the rate to which they are entitled for a particular service, much less the rate paid by, and the services provided to, their competitors.

Third, the new "freedom" to deviate from the terms of a tariff may well invite the very kind of discriminatory practices and preferences that Congress intended to prohibit.[9] As the dissent below correctly reasoned, if carriers were "bound only to those rates and not the corresponding services" set forth in their tariffs, as the Ninth Circuit majority held, "carriers could easily devise schemes to avoid the Communications Act's fairness requirements,"[10] improperly favoring some customers over others. Under the Ninth Circuit majority's view, nothing would prevent an unscrupulous carrier from intentionally granting a competitive advantage to a preferred customer by conferring expedited or enhanced services on that customer alone, thereby discriminating against other customers who pay the same filed rate. LECs properly abiding by the requirements of their tariffs and unwilling to offer selected customers similarly special deals will be at a serious competitive disadvantage.

Fourth, this untenable situation inevitably will engender a procession of lawsuits by customers seeking to circumvent the terms of tariffs on file before federal and state regulators or to obtain the same special deal accorded

[9] *See Maislin*, 497 U.S. at 127-28; *Armour Packing Co. v. United States*, 209 U.S. 56, 81 (1908) (elimination of the filing requirement "opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish").

[10] App. 21a.

to their competitors. Under the Ninth Circuit's decision, any customer—at least within the Ninth Circuit—will be entitled to bring suit under a variety of state law contract and tort theories to enforce alleged agreements for extra-tariff rates or services, or to abrogate or expand services already provided pursuant to tariff. As a result, courts now will be forced to resolve disputes over even the most mundane tariff details.[11] Indeed, this case—involving the specific question whether petitioner's personnel had orally or impliedly promised the respondent quicker service and different billing options than expressly provided for under petitioner's federally filed tariff—is just one example of the many lawsuits that already have been, and will continue to be, filed in courts across the country unless this Court promptly and summarily reverses the Ninth Circuit's erroneous decision. Until now, such lawsuits routinely had been dismissed under the filed rate doctrine.[12]

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[11] *See, e.g., MCI Telecomms. Corp. v. Happy the Glass Man, Inc.*, 974 F. Supp. 1016 (E.D. Ky. 1997) (dismissing a complaint claiming that a billing dispute should not proceed to arbitration, even though the tariff provided for arbitration of such disputes); *Marcus v. AT&T*, 938 F. Supp. 1158, 1163-64 (S.D.N.Y. 1996) (dismissing a complaint claiming that the carrier did not separately notify subscribers that, in billing, the carrier rounded up to the next higher full minute, even though the tariff provided for such rounding); *Porr v. NYNEX Corp.*, 660 N.Y.S.2d 440 (N.Y. App. Div. 1997) (same).

[12] *See, e.g., Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2d Cir. 1994); *H.J., Inc. v. Northwestern Bell Tel. Co.*, 954 F.2d 485, 488-94 (8th Cir.), *cert. denied*, 504 U.S. 957 (1992); *International Tel. Ctr. v. AT&T*, 1997 U.S. Dist. LEXIS 14186, Civ. No. 96-3398 (E.D. La. Sept. 15, 1997); *Multi Comm. Media, Inc. v. AT&T*, 1997 U.S. Dist. LEXIS 5166, Civ. No. 96-2679 (S.D.N.Y. Apr. 17, 1997); *Kutner v. Sprint Comms., L.P.*, 1997 U.S. Dist. LEXIS 16390, Civ. No. 96-2534 (W.D. Tenn. Mar. 21, 1997); *Roth v. AT&T*, 1997 U.S. Dist. LEXIS 2518, Civ. No. 96-7129 (C.D. Cal. Jan. 28, 1997); *Birnbaum v. Sprint Comms. Co.*, L.P., 1996 U.S. Dist. LEXIS 17389, Civ. No. 96-2514 (E.D.N.Y. Nov. 19, 1996); *Porr, supra*, 660 N.Y.S.2d 440 (N.Y. App. Div. 1997); *Southwestern Bell Tel. Co. v. Metro-Link Telecom, Inc.*, 919 S.W.2d 687, 694-97 (Tex. App. 1996); *Teleconnect Co. v. U.S. West Comms., Inc.*, 508 N.W.2d 644, 650 (Iowa 1993).

Such lawsuits pose unwarranted burdens on carriers and consumers. The unpredictability of tariff enforcement will be particularly problematic for the many LECs whose service areas are not confined to one particular state within the Ninth Circuit, but extend to many different states and even many Circuits. Moreover, aside from the enormous litigation expenses that those and other carriers will incur in defending against lawsuits alleging the existence of special deals, carriers potentially will face added costs for providing extra-tariffed services or paying damages for failure to provide those services to a successful plaintiff. Ultimately, LECs will have no choice but to pass those costs on to consumers in the form of higher rates for local telephone service.

In short, permitting the Ninth Circuit majority's decision to stand will have far-reaching and disruptive consequences that will harm consumers and LECs in the Ninth Circuit and across the country.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for a Writ of Certiorari and summarily reverse the decision of the Ninth Circuit.

Respectfully submitted,

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November 17, 1997

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Supreme Court, U.S.
FILED
JAN 23 1998
CLERK

No. 97-679

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP.,
Petitioner,

v.

CENTRAL OFFICE TELEPHONE, INC.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 16, 1997
CERTIORARI GRANTED DECEMBER 12, 1997

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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

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Order of the United States District Court for the District of Oregon dated November 9, 1994 ..... 46a

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Rehearing Denial by the United States Court of Appeals for the Ninth Circuit dated July 18, 1997 ..... 49a

GENERAL DOCKET FOR
Ninth Circuit Court of Appeals

Court of Appeals Docket #: 94-36116 Filed: 11/21/94
Nsuit: 3410 Antitrust (Fed)
Central Office Tele., et al v. American Telephone
Appeal from: District of Oregon (Portland)

* * *

11/21/94 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): Y. setting schedule as follows: CADS due 12/5/94; appellant's designation of RT is due 11/21/94; appellee's designation of RT is due 11/30/94; appellant shall order transcript by 12/12/94; court reporter shall file transcript in DC by 1/10/95; certificate of record shall be filed by 1/17/95; appellant's opening brief is due 2/27/95; appellees' brief is due 3/28/95; appellants' reply brief if any is due within 14 days of service of answering brief. [94-36116] (hh) [94-36116]

12/1/94 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): Y. setting cross appeal briefing schedule as follows: CADS due 12/15/94; appellant's designation of RT is due 12/1/94; appellee's designation of RT is due 12/12/94; appellant shall order transcript by 12/21/94; court reporter shall file transcript in DC by 1/23/95; certificate of record shall be filed by 1/30/95; first cross-appeal brief is due 2/27/95 for defendant; second cross-appeal brief is due 4/10/95 for plaintiff; third cross-appeal brief is due 5/10/95

for defendant; optional cross-appeal reply brief is due 5/24/95 for plaintiff. [94-36156, 94-36116] (hh) [94-36116 94-36156]

2/26/97 FILED OPINION: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. Warren J. FERGUSON; Melvin BRUNETTI, dissenting; Samuel P. King, author.) (4.5 memo sent to Senior judge WJF) FILED AND ENTERED JUDGMENT. [94-36116, 94-36156] (mhf) [94-36116 94-36156]

3/19/97 Filed original and 40 copies Aplt/Cross Aple American Telephone in petition for rehearing with suggestion for rehearing en banc 15 p.pages, served on 3/18/97 (PANEL & all active judges) [94-36116, 94-36156] (mhf) [94-36116 94-36156]

7/18/97 Filed order (Warren J. FERGUSON, Melvin BRUNETTI, Samuel P. King,): The pet for rhrg is DENIED & the suggestion for rhrg en banc is REJECTED. in 94-36156 [94-36116, 94-36156] (mhf) [94-36116 94-36156]

7/29/97 MANDATE ISSUED [94-36116, 94-36156] (mhf) [94-36116 94-36156]

U.S. District Court
U.S. District Court for the District of Oregon (Portland)

CIVIL DOCKET FOR CASE #: 91-CV-1236

Central Office Tele v. American Telephone &
Assigned to: Judge John Jelderks Filed: 11/27/91
Jury demand: Plaintiff
Demand: $0,000 Nature of Suit: 410
Lead Docket: None
Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 15:2 Antitrust Litigation

* * *

1 11/27/91 COMPLAINT-receipt #102290 (tely) [Entry date 12/02/91]

37 06/29/92 AMENDED & SUPPLEMENTAL complaint [1-1] (tely) [Entry date 06/30/92]

55 11/20/92 ANSWER to amended & supplemental complaint [37-1] and COUNTER-CLAIM by Defendant American Telephone & against Plaintiff Central Office Tele (tely) [Entry date 11/23/92]

56 12/10/92 AMENDED ANSWER by Defendant American Telephone & Telegraph [55-1] (tely) [Entry date 12/11/92]

56 12/10/92 AMENDED COUNTER-CLAIM [55-2] by American Telephone & Telegraph (tely) [Entry date 12/11/92]

57 12/10/92 REPLY by Plaintiff Central Office Telephone to Deft's 1st affirmative defense & counterclaim [55-2] (tely) [Entry date 12/11/92]

87 7/14/93 MOTION by Defendant AT&T FOR SUMMARY JUDGMENT Oral Argument Requested (cvsp) [Entry date 07/15/93]

88 7/14/93 MEMORANDUM IN SUPPORT by Defendant AT&T of MOTION FOR SUMMARY JUDGMENT [87-1] (cvsp) [Entry date 07/15/93]

89 7/14/93 AFFIDAVIT of Dean L Bateman Jr re MOTION FOR SUMMARY JUDGMENT [87-1] (cvsp) [Entry date 07/15/93]

90 7/14/93 AFFIDAVIT of Glenn Starr re MOTION FOR SUMMARY JUDGMENT [87-1] (cvsp) [Entry date 07/15/93]

91 7/14/93 AFFIDAVIT of Darsee R Staley re MOTION FOR SUMMARY JUDGMENT [87-1] (cvsp) [Entry date 07/15/93]

99 7/14/93 AFFIDAVIT of Spencer Perry re MOTION FOR PARTIAL SUMMARY JUDGMENT [92-1] (cvsp) [Entry date 07/15/93]

102 7/14/93 STATEMENT OF FACTS by Defendant AT&T in support of MOTION FOR SUMMARY

JUDGMENT [87-1] (cvsp) [Entry date 07/15/93]

104 7/20/93 RULE 220-10 STATEMENT by Plaintiff Central Office Tele (qsdr)

115 8/2/93 STATEMENT OF FACTS by Plaintiff Central Office Tele in support of MOTION response [115-1] (qsdr) [Entry date 08/03/93] [Edit date 08/03/93]

116 8/2/93 AFFIDAVIT by Plaintiff Central Office Tele of Caroline Marie Hall re MOTION response [115-1] (qsdr) [Entry date 08/03/93] [Edit date 08/03/93]

117 8/2/93 AFFIDAVIT by Plaintiff Central Office Tele of Jason Oren re MOTION response [115-1] (qsdr) [Entry date 08/03/93] [Edit date 08/03/93]

118 8/2/93 AFFIDAVIT by Plaintiff Central Office Tele of Gordon Rood re MOTION response [115-1] (qsdr) [Entry date 08/03/93] [Edit date 08/03/93]

119 8/2/93 CERTIFICATE OF SERVICE of affidavit [119-1] affidavit [118-1] affidavit [117-1] statement [116-1] MOTION response [115-1] by Plaintiff Central Office Tele (qsdr) [Entry date 08/03/93] [Edit date 08/03/93]

179 10/14/93 MOTION by Plaintiff Central Office Tele TO AMEND ITS SECOND AMENDED COMPLAINT TO ADD CLAIMS UNDER THE

FEDERAL COMMUNICATIONS ACT OF 1934 (qsdr) [Entry date 10/18/93]

180 10/14/93 MEMORANDUM IN SUPPORT by Plaintiff Central Office Tele of MOTION TO AMEND ITS SECOND AMENDED COMPLAINT TO ADD CLAIMS UNDER THE FEDERAL COMMUNICATIONS ACT OF 1934 [179-1] (qsdr) [Entry date 10/18/93]

181 10/14/93 AFFIDAVIT by Plaintiff Central Office Tele of Bruce M Hall re MOTION TO AMEND ITS SECOND AMENDED COMPLAINT TO ADD CLAIMS UNDER THE FEDERAL COMMUNICATIONS ACT OF 1934 [179-1] (qsdr) [Entry date 10/18/93]

189 10/26/93 AFFIDAVIT by Plaintiff Central Office Tele of Bruce M Hall re MOTION reply [188-1] (qsdr) [Entry date 10/27/93]

204 12/8/93 ORDER by Judge John Jelderks DENYING Plaintiff's MOTION FOR PARTIAL SUMMARY JUDGMENT [92-1] GRANTING in part and DENYING in part MOTION FOR SUMMARY JUDGMENT [87-1] Signed 12/8/93 (counsel notified) (qsdr)

206 12/16/93 RECORD OF PROCEEDINGS before Judge John Jelderks DENYING Plaintiff's MOTION TO AMEND ITS SECOND AMENDED COMPLAINT TO ADD CLAIMS UNDER THE FEDERAL COMMUNICATIONS ACT OF 1934 [187-1] GRANTING Defendants MOTION FOR LEAVE TO FILE SECOND

AMENDED ANSWER [184-1], 3 week jury trial set for 6/7/94 (cc: Counsel notified) Court Rptr TenBrook Tapes 633 & 634 (tely) [Entry date 12/29/93]

208 1/13/94 SECOND AMENDED ANSWER and COUNTERCLAIM by Defendant American Telephone & Telegraph [56-1] (qsdr) [Entry date 01/14/94]

366 6/7/94 RECORD OF JURY TRIAL 1st day; Pretrial conference with counsel before Judge John Jelderks GRANTING Defendant's MOTION TO QUASH TRIAL SUBPOENAS [346-1]; DENYING Defendant's MOTION IN LIMINE TO EXCLUDE VIDEOTAPE [249-1]; Jury Trial commences: Venire panel sworn and voir dire conducted; opening statements given by counsel; ORDER DENYING Defendant's MOTION IN LIMINE TO EXCLUDE CERTAIN EVIDENCE REGARDING DEPOSITS [259-1]; Witness sworn and testimony adduced. VOIR DIRE BEGINS JURY IMPANELED JURY TRIAL BEGINS; Trial shall reconvene 8:30, 6/8/94 (counsel notified) Court Rptr Kathy Eismann & Liz Meacham (qsdr) [Entry date 06/09/94]

367 6/8/94 RECORD OF JURY TRIAL 2nd day before Judge John Jelderks Continued questioning of Mr. Rood. JURY TRIAL to be continued on 8:30 6/9/94 (counsel notified) Court Rptr Kathy Eismann & Liz Meacham (qsdr) [Entry date 06/09/94]

383 6/17/94 MOTION by Defendant American Telephone & FOR DIRECTED VERDICT (qsdr) [Entry date 06/20/94]

384 6/17/94 MEMORANDUM IN SUPPORT by Defendant American Telephone & of MOTION FOR DIRECTED VERDICT ON COT'S INTERFERENCE CLAIM [383-1] (qsdr) [Entry date 06/20/94]

385 6/17/94 MOTION by Defendant American Telephone & TO STRIKE DAMAGES STUDY, and FOR DIRECTED VERDICT memorandum in support (qsdr) [Entry date 06/20/94]

386 6/17/94 MEMORANDUM IN SUPPORT by Defendant American Telephone & of MOTION FOR DIRECTED VERDICT ON COT'S BREACH OF CONTRACT AND BREACH OF IMPLIED COVENANT CLAIMS [383-1] (qsdr) [Entry date 06/20/94]

387 6/17/94 MEMORANDUM IN SUPPORT by Defendant American Telephone & of MOTION FOR DIRECTED VERDICT ON COT'S FRAUD AND "GROSS NEGLIGENCE" CLAIMS [383-1] (qsdr) [Entry date 06/20/94]

390 6/20/94 PRETRIAL ORDER approved by Judge John Jelderks Signed 6/7/94 (qsdr)

400 6/23/94 MOTION by Defendant American Telephone & FOR JUDGMENT AS A MATTER OF LAW (DIRECTED VERDICT) (qsdr)

401 6/23/94 MEMORANDUM IN SUPPORT by Defendant American Telephone & of MOTION FOR JUDGMENT AS A MATTER OF LAW (DIRECTED VERDICT) [400-1] (qsdr)

402 6/23/94 AMENDED PROPOSED JURY INSTRUCTIONS by Defendant American Telephone (qsdr)

403 6/23/94 MEMORANDUM IN SUPPORT by Defendant American Telephone & of request for jury instructions numbers 26-30 and 35 (qsdr)

405 6/9/94 RECORD OF JURY TRIAL 3rd day before Judge John Jelderks Witnesses sworn and testimony adduced. Order DENYING Defendant's oral motion to strike testimony re: AT&T lying. (counsel notified) Court Rptr Kathy Eismann & Liz Meacham (qsdr) [Entry date 06/27/94]

406 6/10/94 RECORD OF JURY TRIAL 4th day before Judge John Jelderks Witnesses sworn and testimony adduced. Trial shall reconvene at 8:30, 6/13/94. (counsel notified) Court Rptr Kathy Eismann (qsdr) [Entry date 06/27/94]

407 6/13/94 RECORD OF JURY TRIAL 5th day before Judge John Jelderks Witnesses sworn and testimony adduced. ORDER reserving ruling on Defendant's oral motion to exclude Plaintiff's exhibits 65, 67, 69. Order trial shall reconvene at 8:30, 6/14/94. (counsel notified) Court Rptr Kathy Eismann & Linda McDonald (qsdr) [Entry date 06/27/94]

408 6/14/94 RECORD OF JURY TRIAL 6th day before Judge John Jelderks Witnesses sworn and testimony adduced. ORDER Helen O'Dell is excused from further jury service. Trial shall reconvene at 8:30, 6/15/94. (counsel notified) Court Rptr Kathy Eismann & Liz Meacham (qsdr) [Entry date 06/27/94]

409 6/15/94 RECORD OF JURY TRIAL 7th day before Judge John Jelderks Witnesses sworn and testimony adduced. ORDER trial shall reconvene at 8:30, 6/16/94. (counsel notified) Court Rptr Kathy Eismann & Liz Meacham (qsdr) [Entry date 06/27/94]

410 6/16/94 RECORD OF JURY TRIAL 8th day before Judge John Jelderks Witnesses sworn and testimony adduced. ORDER RESERVING ruling on AT&T's oral motion for the court to take judicial notice of the tariffs. DENYING AT&T's oral motion to strike exhibit #257 and testimony on all future damages. Trial shall reconvene at 8:30, 6/17/94. (counsel notified) Court Rptr Kathy Eismann & Liz Meacham (qsdr) [Entry date 06/27/94]

411 6/17/94 RECORD OF JURY TRIAL 9th day before Judge John Jelderks Witnesses sworn and testimony adduced. ORDER striking all testimony and evidence on Plaintiff's theory of diminution of value. Plaintiff rests. ORDER TAKING UNDER ADVISEMENT Defendant's MOTION TO STRIKE DAMAGES STUDY [385-1] and MOTION DIRECTED VERDICT [385-2]; TAKING UNDER ADVISEMENT Defendant's

FOR JUDGMENT AS A MATTER OF LAW [383-1]. ORDER taking under advisement Defendant's renewed oral motion for the court to take judicial notice of the tariffs. ORDER trial shall reconvene (with counsel only) at 2:30, 6/10/94. Trial shall reconvene with counsel and jury at 8:30, 6/21/94. (counsel notified) Court Rptr Kathy Eismann & Liz Meacham (qsdr) [Entry date 06/27/94]

412 6/20/94 RECORD OF JURY TRIAL 10th day before Judge John Jelderks Oral argument on pending motions. ORDER trial shall reconvene at 8:30, 6/21/94. (counsel notified) Court Rptr Kathy Eismann & Liz Meacham (qsdr) [Entry date 06/27/94]

413 6/21/94 RECORD OF JURY TRIAL 11th day before Judge John Jelderks DENYING AT&T's MOTION TO STRIKE DAMAGES STUDY [385-1] and DENYING AT&T's MOTION FOR JUDGMENT AS A MATTER OF LAW BASES UPON NO EVIDENCE OF DAMAGE [385-2]; GRANTING IN PART & DENYING IN PART AT&T's MOTION FOR JUDGMENT AS A MATTER OF LAW [383-1] as follows: First claim (interference) motion is DENIED, Second claim (fraud) GRANTED, Third claim (gross negligence) GRANTED, Fourth claim (breach of contract) DENIED, Fifth claim (breach of the implied covenant) DENIED. DENYING Plaintiff Central's MOTION TO ADMIT EVIDENCE OF AT&T'S FINANCIAL CONDITION [373-1]. Punitive damages will not be submitted to the jury. ORDER GRANTING AT&T's oral motion

for the court to take judicial notice of the tariffs. Witnesses sworn and testimony adduced. ORDER trial shall reconvene at 8:30, 6/22/94. (counsel notified) Court Rptr Kathy Eismann & Liz Meacham (qsdr) [Entry date 06/27/94]

414 6/22/94 RECORD OF JURY TRIAL 12th day before Judge John Jelderks FINDING MOOT Plaintiff's MOTION FOR EXPEDITED RESPONSE TO SECOND REQUEST FOR ADMISSIONS NO. 29 [393-1] MOOT. ORDER DENYING Plaintiff's oral motion to strike Bershaw's testimony. Trial shall reconvene at 8:30, 6/23/94. (counsel notified) Court Rptr Kathy Eismann & Liz Meacham (qsdr) [Entry date 06/27/94]

415 6/24/94 STATEMENT OF AGREED FACTS in Connection with the trial court's charge to the jury (qsdr) [Entry date 06/27/94]

418 6/24/94 JURY INSTRUCTIONS 6/24/94 (qsdr) [Entry date 06/27/94]

421 6/23/94 RECORD OF JURY TRIAL 13th day before Judge John Jelderks Witnesses sworn and testimony adduced. Defendant rests. ORDER DENYING Plaintiff's oral MOTIONS for JUDGMENT as a matter of law (as to the counterclaim). ORDER DENYING Defendants RENEWED MOTIONS FOR JUDGMENT as a matter of law. Closing arguments given. (counsel notified) Court Rptr Kathy Eismann & Liz Meacham (tely) [Entry date 06/28/94]

422 6/24/94 RECORD OF JURY TRIAL 14th day before Judge John Jelderks. Closing argument given by counsel. Jury instructed by the court & retire to deliberate. Lunches for 8 jurors & one bailiff were delivered. Jurors requested & were provided 4 soda pops. ORDER jury shall return at 8:30 am on 6/27 to continue deliberations. (counsel notified) Court Rptr Eismann & Meacham (tely) [Entry date 06/28/94]

423 6/27/94 RECORD OF JURY TRIAL 15th day before Judge John Jelderks. Discussion with counsel re jury note received by Court at 4:40pm on 6/24/94. Written answer to the jury note given to the jury by the Court. Jury returned a verdict in favor of Plaintiff. Jury discharged by the Court from further service. (counsel notified) Court Rptr R Stimler (tely) [Entry date 06/28/94]

424 6/27/94 JURY VERDICT for Plaintiff Central Office Tele against Defendant American Telephone & Telegraph (see file) (tely) [Entry date 06/28/94]

427 7/1/94 FINAL JUDGMENT THAT THE PLAINTIFF CENTRAL OFFICE TELEPHONE INC. RECOVER FROM THE DEFENDANT, AMERICAN TELEPHONE & TELEGRAPH CO, the sum of THIRTEEN MILLION DOLLARS ($13,000,000), with post-judgment interest thereon compounded annually at the federal interest rate of 5.31%; & that the defendant take nothing on its counterclaim, and that the counterclaim is dismissed on the merits; and that Plaintiff recover the costs of this action. (See formal Judgment) Signed 7/1/94

microfilmed 7/1/94 Judge John Jelderks (cc: Counsel notified) (dcap) [Entry date 07/05/94]

435 7/19/94 TRANSCRIPT of (trial) 6/7/94 before Judge John Jelderks: Vol. I - pages 1-193 (Wyke) [Entry date of 07/20/94]

436 7/19/94 TRANSCRIPT of (trial) 6/8/94 before Judge John Jelderks: Vol. II- pages 195-445 (Wyke) [Entry date of 07/20/94]

437 7/19/94 TRANSCRIPT of (trial) 6/9/94 before Judge John Jelderks: Vol. III - pages 446-702 (Wyke) [Entry date of 07/20/94]

438 7/19/94 TRANSCRIPT of (trial) 6/10/94 before Judge John Jelderks: Vol. IV - pages 702-960 (Wyke) [Entry date of 07/20/94]

439 7/19/94 TRANSCRIPT of (trial) 6/13/94 before Judge John Jelderks: Vol. V - pages 961-1214 (Wyke) [Entry date of 07/20/94]

440 7/19/94 TRANSCRIPT of (trial) 6/14/94 before Judge John Jelderks: Vol. VI - pages 1215-1494 (Wyke) [Entry date of 07/20/94]

441 7/19/94 TRANSCRIPT of (trial) 6/15/94 before Judge John Jelderks: Vol. VII - pages 1495-1759 (Wyke) [Entry date of 07/20/94]

442 7/19/94 TRANSCRIPT of (trial) 6/16/94 before Judge John Jelderks: Vol. VIII - pages 1760-1917 (Wyke) [Entry date of 07/20/94]

443 7/19/94 TRANSCRIPT of (trial) 6/17/94 before Judge John Jelderks: Vol. IX - pages 1918-2137 (Wyke) [Entry date of 07/20/94]

444 7/19/94 TRANSCRIPT of (trial) 6/20/94 before Judge John Jelderks: Vol. X - pages 2138-2203 (Wyke) [Entry date of 07/20/94]

445 7/19/94 TRANSCRIPT of (trial) 6/21/94 before Judge John Jelderks: Vol. 11 - pages 2204-2438 (Wyke) [Entry date of 07/20/94]

446 7/19/94 TRANSCRIPT of (trial) 6/22/94 before Judge John Jelderks: Vol. 12 - pages 2439-2712 (Wyke) [Entry date of 07/20/94]

447 7/19/94 TRANSCRIPT of (trial) 6/23/94 before Judge John Jelderks: Vol. 13 - pages 2713-2935 (Wyke) [Entry date of 07/20/94]

448 7/19/94 MOTION by Defendant American Telephone & FOR JUDGMENT AS A MATTER OF LAW AFTER TRIAL, or FOR NEW TRIAL OR FOR REMITTITUR Oral Argument Requested (dcap) [Entry date 07/21/94]

449 7/19/94 MEMORANDUM IN SUPPORT by Defendant American Telephone & Telegraph of MOTION FOR JUDGMENT AS A MATTER OF LAW AFTER TRIAL [448-1], or FOR NEW TRIAL OR FOR REMITTITUR [448-2] (dcap) [Entry date 07/21/94]

450 7/19/94 AFFIDAVIT of Milo Petranovich MOTION FOR JUDGMENT AS A MATTER OF LAW AFTER

TRIAL [448-1], OR FOR NEW TRIAL OR FOR REMITTTITUR [448-2] (dcap) [Entry date 07/21/94]

451 7/19/94 RECORD OF ORDER by Judge John Jelderks GRANTING MOTION TO ALLOW FILING OF A MEMORANDUM IN SUPPORT OF JUDGMENT AS A MATTER OF LAW OR A NEW TRIAL TO EXCEED PAGE LIMITATION [431-1], GRANTING MOTION TO STAY EXECUTION OF JUDGMENT PENDING POST-TRIAL MOTIONS. [428-1] (counsel notified) (dcap) [Entry date 07/21/94]

458 8/4/94 MEMORANDUM IN OPPOSITION by Plaintiff Central Office Tele re MOTION FOR JUDGMENT AS A MATTER OF LAW AFTER TRIAL [448-1], re MOTION FOR NEW TRIAL OR FOR REMITTTITUR [448-2] (kab)

459 8/4/94 DECLARATION by Plaintiff Central Office Tele of James T McDermott in support of memorandum [458-1] (kab)

471 8/26/94 SUPPLEMENTATION TO RESPONSE TO AT&T'S MOTIONS FOR JNOV NEW TRIAL AND REMITTER by Central Office Telephone (kab) [Entry date 08/29/94]

474 8/31/94 RECORD OF PROCEEDINGS (Oral Argument) before Judge John Jelderks FINDING the MOTION TO CORRECT THE RECORD [467-1] moot, Written rulings to follow re MOTION FOR JUDGMENT AS A MATTER OF LAW AFTER TRIAL [448-1] and MOTION FOR

NEW TRIAL OR FOR REMITTTITUR [448-2] (cc: Counsel notified) Court Rptr Tapes 843 844 845 (kab) [Entry date 09/07/94]

475 9/8/94 SUPPLEMENTAL MEMORANDUM IN SUPPORT by Defendant American Telephone & of MOTION FOR JUDGMENT AS A MATTER OF LAW AFTER TRIAL [448-1], of MOTION FOR NEW TRIAL OR FOR REMITTTITUR [448-2] (kab)

479 9/13/94 TRANSCRIPT of 8/31/94 before Judge John Jelderks (kab) [Entry date 09/14/94]

480 11/9/94 OPINION re MOTION FOR JUDGMENT AS A MATTER OF LAW AFTER TRIAL [448-1], MOTION FOR NEW TRIAL OR FOR REMITTTITUR [448-2] Signed 11/9/94 by Judge John Jelderks (counsel notified) (kab)

481 11/9/94 ORDER by Judge John Jelderks GRANTING IN PART AND DENYING IN PART MOTION FOR JUDGMENT AS A MATTER OF LAW AFTER TRIAL [448-1] an amended judgment will be entered; CONDITIONALLY DENYING ALTERNATIVE MOTION FOR NEW TRIAL; DENYING MOTION FOR REMITTTITUR [448-2] Signed 11/9/94 notified) (kab)

482 11/9/94 AMENDED JUDGMENT in favor of plaintiff for $1,154,000; interest shall accrue on this amount commencing 7/1/94. Signed 11/9/94 microfilmed 11/9/94 Judge John Jelderks (cc: Counsel notified) (kab)

483 11/10/94 NOTICE OF APPEAL to Court of Appeals by Defendant American Telephone from 7/1/94 judgment, 11/9/94 order & 11/9/94 amended judgment (kab)

500 1/5/95 TRANSCRIPT of 12/16/93 Oral Argument before Judge John Jelderks (kab) [Entry date 01/06/95]

(Counsel list omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CENTRAL OFFICE TELEPHONE, INC.	) Civil Action No. 91-1236JE
Plaintiff,	) AMENDED AND SUPPLEMENTAL
v.	) COMPLAINT FOR TREBLE DAMAGES UNDER THE
AMERICAN TELEPHONE & TELEGRAPH COMPANY,	) ANTITRUST LAWS, AND RELATED STATUTORY AND COMMON LAW CLAIMS
Defendant.	)

JURISDICTION AND VENUE

1.

Plaintiff brings this action against Defendant under §§ 4, 14 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26) to recover treble damages for injuries it has sustained as a result of violations by Defendant of § 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) under 28 U.S.C. § 1337; and as a matter of diversity jurisdiction under 28 U.S.C. § 1332(a); and under the principles of pendent jurisdiction. The amount in controversy, exclusive of interest and costs, exceeds $50,000.

2.

Venue is properly laid pursuant to 15 U.S.C. § 78aa and 28 U.S.C. § 1391(a) and (b) in the District of Oregon wherein Defendant is found, transacts business, and has agents. Some or all of the violations which are the subject of this complaint have been and are being carried out in the District of Oregon.

Plaintiff

3.

Central Office Telephone, Inc. ("COT") is an Oregon corporation which has done business in the State of Oregon and nationally, and with its principal place of business in Milwaukee, Oregon. COT is what is described in the trade and by AT&T as a "switchless reseller". COT and AT&T compete in a downstream market consisting of the sale of SDN services to end users. Most of these end users are larger users purchasing such services from AT&T directly. Some of these same direct users may in turn elect to resell all or a portion of the services purchased from AT&T to other end users. COT and other resellers compete in this market by subscribing to a master account with AT&T in the expectation that they will be able to obtain the volume discounts described hereinafter, based upon the total usage of the resellers' aggregate customer accounts. Neither COT nor other non-direct resellers can access any other Virtual Private Line Network facility, nor do Plaintiff or other resellers have the technical or financial ability to duplicate such facility. AT&T itself acts as a reseller in competition with Plaintiff and other resellers by seeking out Plaintiff's existing and prospective customers for itself.

4.

As set forth hereinbefore, AT&T's SDN facilities constitute the only upstream market for Virtual Private Line Networks for resellers such as COT. Access to the Software Defined Network is essential to Plaintiff and other resellers in order to compete with AT&T in the sale of SDN services within the downstream market.

Defendant

5.

American Telephone & Telegraph Company ("AT&T") is a corporation organized and existing under the laws of the State

of New York, with its principal place of business in New York, New York. AT&T owns and operates extensive facilities through access to which it provides telephone communications services nationally.

6.

One such facility is entitled by AT&T "Software Defined Network," or SDN. SDN was initiated by AT&T to provide access to its customers into the Virtual Private Line Network. SDN was designed by AT&T to occupy Virtual Private Line Network, and, for purposes of this action, constitutes the upstream market to which COT and other resellers seek access. By law AT&T is required to provide similar access to competitors in the provision of Virtual Private Line Network services emanating from its Virtual Private line Network facility (SDN).

7.

During all times relevant to this complaint SDN has been for resellers synonymous with the Virtual Private Line Network. AT&T, by virtue of its exclusive control over access to its Software Defined Network facility, controls totally competition by resellers in the downstream market as well as more than 80% of the market for Virtual Private Line Network Services.

8.

A Virtual Private Line Network is a separate digital facility that offers unique features and quality greatly superior to the normal switched type of long distance products. Dedicated connections between each user's switch and AT&T's Point of Presence ("POP") are all digital. This eliminates the need for modems when transmitting data and increases the effective speed from perhaps 9600 bits per second to 56000 bits per second. In addition, a Virtual Private Line Network allows dial

up 56K to any other facility on the network that also has a dedicated facility to the closest POP. This completely changes the economics for multiple user customers who wish to transmit significant amounts of data but cannot justify the high cost of dedicated lines, or facilities, connecting all of the remote locations they wish to access.

9.

By having the dedicated access, generally but not always a T-1 type dedicated access, the end user can also significantly reduce the cost of calls between non-dedicated points in their private network. The Virtual Private Line Network offers a significant and unique array of features that route calls from remote locations to a centralized dedicated location inward through the dedicated facility as well as routing outward calls directly to the carrier's POP. The use of the dedicated facility eliminates the need for the carrier to pay originating or terminating access charges to the local telephone company, creating a substantial savings to the customer as well.

10.

As set forth hereinbefore, AT&T's SDN facilities constitute the only upstream market for Virtual Private Line Networks for resellers such as COT. Access to the Software Defined Network is essential to Plaintiff and other resellers in order to compete with AT&T in the sale of SDN services within the downstream market.

TRADE AND COMMERCE AFFECTED

11.

The relevant geographic market within which SDN services are sold to COT and other resellers is the territorial United States of America. The relevant product market in which COT competes is the downstream market as hereinbefore described, for the provision of the unique SDN services

emanating from AT&T's SDN facilities through direct sale and resale to end users of such services. AT&T is believed to control more than 80% of this market. The amount of interstate commerce involved herein is substantial.

BACKGROUND

12.

In about September of 1989 COT learned that AT&T was offering SDN services, as described in paragraphs 6 through 9 hereinbefore, to persons who would resell such services at a profit both to themselves and to AT&T. In meetings prior to October 25, 1989, AT&T representatives spelled out to COT the details of this service. AT&T outlined a number of options COT could select within SDN, depending upon the amount of minutes per year up to a four year period, COT would select. Option II was of initial interest to COT, which would require COT to aggregate sufficient customers of its own to guarantee to AT&T 2,000,000 minutes per year of usage over the proposed four year period. Compensation under this plan would be in the form of volume discounts as per the following schedule:

Monthly	E.V.P.	U.R.P.	International
$0-$10,0000	0	0	0
$10,000-$15,000	0	5%	0
$15,000-$20,000	20%	5%	0
$20,000-$30,000	20%	5%	5%
$30,001-$300,000	20%	5%	13%
Over $300,000	20%	5%	16%

13.

Further negotiations between COT and AT&T with regard to the SDN COT sought specific responses to the specific questions as a condition precedent to an agreement. These were the representations made by AT&T:

a. AT&T would bill Plaintiff's customers and collect revenues from them, and/or COT to apply towards the billing liability of COT.

b. AT&T has filed a tariff which would provide for the proper functioning of the proffered SDN program when purchased by third parties such as Plaintiff.

c. AT&T would permit use of the SDN Calling Card (Credit Card) and that COT customers could use this card to make calls to any international location as well as originate calls from any "U.S. Direct" country.

d. AT&T would make up the initial printing of SDN Calling Cards with both the AT&T and COT logo printed on them.

e. AT&T would furnish timely "call detail" to COT SDN customers directly when using either the Location-Account Billing Option (LABO) or the Multi-Location Billing (MLB).

f. AT&T could allocate any fixed percentage of a corollary plan entitled the Expanded Volume Plan (EVP) to each of the COT SDN customer locations based on the relative calling volume affected by the EVP.

14.

All of the foregoing representations were false at the time made. Specifically:

a. Paragraph 12a was false in that no billing from October 25, 1989 to date to Plaintiff's customers has been correct, and AT&T has never remitted to Plaintiff any revenues.

b. Paragraph 12b was false in that the program has never functioned properly - in the words of AT&T, "this thing is broke."

c. Paragraph 12c was false in that AT&T provided no calling (credit) card.

d. Paragraph 12d was false in that AT&T provided no initial or any printing of the SDN Calling Card.

e. Paragraph 12e was false in that AT&T failed to provide timely call detail to Plaintiff's customers.

f. Paragraph 12f was false in that although requested by Plaintiff, the allocation described has never been made.

15.

During the precontractual negotiations described in paragraphs 12 and 13 hereinbefore, AT&T failed to make the following material disclosures to COT:

a. That a sales limit would be imposed as to the number of orders which could be placed into service each month.

b. That a security deposit would be required.

c. That the same percentage of discount which COT provided its customers under the EVP had to be similarly applied to COT's URP and International discounts.

d. That call detail reports for individual COT customers would be sent at a later date under separate cover.

16.

On October 25, 1989, COT entered an agreement with AT&T to become AT&T's customer as a reseller of SDN services under Option II. The billing option chosen was Multi-Location Billing. Under this option, AT&T represented that any percentage of the expanded volume discount (EVP), could be awarded to the COT customer and the remaining discount could be allocated to COT. In fact, AT&T never made this allocation.

17.

In November of 1989, COT delivered its logos for the Calling Cards to AT&T. In January, 1990, contrary to prior representations, AT&T refused to permit COT, as well as other resellers, to use the Calling Card. As an alternative, AT&T offered the use of the Network Remote Access ("NRA") card which AT&T represented would enable COT SDN customers

to place calls to any domestic or international location. These representations were false in that all international calls attempted by COT's customers were blocked, and initial domestic call service, including percentage of calls completed, was substandard.

18.

In February of 1990, AT&T represented that a new Tariff option had been filed, but not yet approved, whereby the MLCP plan could be included in conjunction with the SDN. The minutes that would be generated under the MLCP plan would be credited toward the SDN commitment if the proposed Tariff was approved. In addition to this, if the Tariff was approved, AT&T would credit 10% of MLCP all revenues towards the SDN account up through December of 1990. To obtain the swifter connection, equal access and interim savings while awaiting connection to the SDN which AT&T represented would accrue to customers, COT agreed to subscribe to MLCP.

19.

In about March of 1990, AT&T proffered to COT an additional program, Option VI under the SDN. Option VI would require COT to aggregate sufficient customers of its own to guarantee to AT&T 15,000,000 minutes per year of usage over the agreed four year period. The same representations and omissions set forth in paragraphs 12 through 15 were reaffirmed as to Option VI, and were false or misleading for the reasons set forth above. Under Option VI, COT was to receive the following schedule of discounts:

Monthly	E.V.P.	U.R.P.	International
$0-$10,0000	0	0	0
$10,000-$15,000	0	5%	0
$15,000-$30,000	17%	5%	5%
$30,001-$300,000	27%	5%	13%

Over $300,000	27%	5%	16%

Based upon the representations hereinbefore set forth, COT agreed to proceed under Option VI and contracted with AT&T for the services under this Option on or about April 9, 1990.

20.

In May or June of 1990, AT&T advised COT that there was difficulty in getting customers installed on the SDN network. A schedule of window dates was submitted for each month. AT&T represented that customers who were submitted to AT&T by this date would be installed on the network about the 10th to 20th of the second following month.

21.

In April 1990, some customers of COT were finally installed on the SDN network for which COT had contracted. As to these, however, AT&T could not explain to COT which had been installed. The remainder were installed late, most had severe customer verification problems, and some were left being served by their prior carrier. Over a period of four to five months there had been over 200 customer locations submitted to AT&T for installation. Sales personnel had to call customers and ask them to dial the verification numbers on each individual telephone line to determine if that line was on the AT&T system or not. Many of the customers had some numbers on the SDN network but others were on the former carrier. About 30% of the numbers failed to be installed. Some multiple location customers would have some location installed while other locations were not. In short, the representations set forth above were false.

22.

In July and August of 1990, contrary to representations made by AT&T, no new orders submitted by COT were

installed onto the SDN. A majority of COT's MLCP orders were never implemented. To date, AT&T has failed to reconcile multiple billing errors on COT's individual customer accounts. Due to AT&T's failure to implement COT's orders on a timely basis, thousands of calls made by COT's customers are "unbilled toll" or "suppressed billing". In 1991, AT&T notified COT, as well as all other resellers, that all unbilled toll for the years 1989 and 1990 would be forgiven, causing COT to lose revenues based on all billings made during this time frame. In addition, despite repeated requests by COT to AT&T, AT&T failed to rectify incidents of unauthorized changes made in the designated carriers ("slamming") of COT's customers.

23.

In April of 1991, AT&T imposed a 2% rate increase for SDN services. On or about December 16, 1991, AT&T imposed another 2% rate increase. Finally, on or about June 1, 1992, AT&T increased rates on its SDN service by 7%. These rate increases have caused the rates which COT must in turn charge its SDN customers to become noncompetitive and has forced COT to disconnect all of its SDN accounts.

24.

As a result of the misrepresentations and omissions, hereinbefore set forth, and the failure of AT&T to perform the services for which COT had contracted and which AT&T had represented would be effectively performed, COT has been injured, inter alia, in these respects:

a. Lost revenues on MLCP account because of the failure of AT&T to issue orders and install the service within promised time constraints.

b. Lost revenues on SDN account because of errors made in handling orders, placing orders, implementing orders and sending the information to local exchange companies.

c. Lost customers due to billing problems.

d. Lost time of employees.

e. Loss of two sales persons.

f. Lost time in training new personnel to replace lost sales persons.

g. Increased telephone calls due to rectify problems.

h. COT SDN account customers placed on other accounts.

i. Increased billing and mailing costs.

j. Lost sales due to poor referral list.

k. Lost sales time in remedial customer reactions.

l. Vendors and agents becoming inactive due to lost sales commissions.

m. Lost opportunities for new business.

n. Contraction of COT's reasonably expected growth.

o. Restricted cash flow.

p. Damage to the name of COT.

q. Decreased value of the company due to loss of profitability and goodwill.

r. Lost revenues on the SDN account due to rate increases.

q. Lost revenues on MLCP and SDN accounts due to inaccurate billings to COT customers.

FIRST CLAIM FOR RELIEF
(Violations of Section 2 of the Sherman Act--
Attempted Monopolization and Monopolization)

25.

Plaintiff realleges paragraphs 1 through 24 as though fully set forth.

26.

The false misrepresentations, material omissions, and conduct set forth in paragraph 12 and following, and the constant failure to set up, provision and service Plaintiff's customers within promised or any reasonable time frame, and to perform proper or any accounting for the benefit of COT and

its customers, was part of a deliberate scheme whereby AT&T, in control of access to service and facilities essential to COT's ability to operate its business successfully, rendered such access economically ruinous to COT. This conduct was intended to and did advance AT&T's attempted monopolization and control over SDN in the territorial United States, and excluded COT and other resellers from meaningful competition with AT&T for SDN customers. As an additional tactic in its attempted monopolization, and to consolidate its existing monopoly of the SDN system, AT&T consistently favored its own commercial customers over those of COT as to set up provisioning, service and billing, to the substantial injury of COT and other resellers attempting to compete with AT&T. It is feasible for AT&T to provide access to this essential facility. The resultant injury to COT and to resellers generally was in violation of Section 2 of the Sherman Act.

27.

As a direct and proximate result of AT&T's violations as set forth hereinbefore, Plaintiff has been injured in its business and property in an amount to be determined at trial, but presently estimated to be $4,600,000 said sum to be trebled in accordance with 15 USC § 15, together with Plaintiff's reasonable court costs and reasonable attorneys' fees.

SECOND CLAIM FOR RELIEF
(Violations of ORS 646.705 through 646-730 - Attempted Monopolization and Monopolization under Oregon law)

28.

Plaintiff realleges paragraphs 1 through 27, as though fully set forth.

29.

As a direct result of AT&T's attempted monopolization and monopolization, favoring its direct customers, Plaintiff has been damaged in the sum of $4,600,000, an amount to be trebled, pursuant to ORS 646.780, together with the costs of suit, including necessary reasonable investigative costs and reasonable expert fees, and a reasonable attorney's fee.

THIRD CLAIM FOR RELIEF
(ORS 646.010 through ORS 646.180 - Price Discrimination)

30.

Plaintiff realleges paragraphs 1 through 29, as though fully set forth.

31.

AT&T offered SDN for sale to independent communications businesses such as Plaintiff who can resell SDN by aggregating smaller customers who alone do not use enough long distance services to qualify for volume discounts. AT&T also offered SDN for sale to AT&T's large customers who receive volume discounts by subscribing to purchase large amounts of long distance communication time. AT&T's customers who do not need all of the time purchased for their needs may resell unused portions to other users. Plaintiff is in competition with those customers of AT&T who resell unused portions of their SDN time to others. AT&T is also directly soliciting the customers Plaintiff seeks to aggregate.

32.

AT&T's intentional acts as set forth in paragraphs 12 through 23 hereinabove, prevented Plaintiff from securing volume discounts on SDN for its customers. AT&T discriminated against Plaintiff when it prevented Plaintiff from securing volume discounts on SDN while favoring AT&T, its

direct customers and Plaintiff's competitors in provisioning SDN thereby precluding Plaintiff from obtaining price discounts nominally available to Plaintiff on the offered product.

33.

AT&T's discriminatory conduct, as set forth in Plaintiff's Third Claim, is in violation of ORS 646.080. Plaintiff is entitled to its damages in the amount of $4,600,000, to be trebled, its court costs and reasonable attorneys' fees.

FOURTH CLAIM FOR RELIEF
(Intentional Interference with Contractual Relationships and Prospective Business advantage.)

34.

Plaintiff realleges paragraphs 1 through 24 as though fully set forth.

35.

AT&T's conduct, as set forth in paragraphs 12 through 23 was intended to and did interfere with COT's contractual relationships with its customers. As a result, many of COT's customers have left COT, and many remaining customers have refused to pay all or portions of their billings for service. In addition, the problems caused by AT&T have been attributed to Plaintiff by many customers and prospective customers, and Plaintiff's prospective business advantage has thereby suffered injury, all to Plaintiff's damage in the sum of $4,600,000. Because this conduct was intentional and in reckless disregard of the rights of COT, COT is entitled to punitive and exemplary damages in the amount of $10,000,000.

FIFTH CLAIM FOR RELIEF
(Misrepresentation and Deceit)

36.

Plaintiff realleges paragraphs 1 through 24 of its complaint as though fully set forth.

37.

AT&T's misrepresentations and misconduct as described hereinbefore, were intentional, and defrauded and misled Plaintiff. AT&T intended that Plaintiff rely upon its fraudulent conduct and misrepresentations, and Plaintiff did so to its damage in the sum of $4,600,000.

38.

As a result of its reckless disregard for Plaintiff's rights, AT&T is also liable to Plaintiff for exemplary and punitive damages in the amount of $10,000,000.

SIXTH CLAIM FOR RELIEF
(Gross Negligence)

39.

Plaintiff realleges paragraphs 1 through 24 as though fully set forth.

40.

As an alternative claim to Plaintiff's Fifth Claim, the misrepresentations and misconduct described hereinbefore, were grossly negligent, and Plaintiff has been damaged thereby in the sum of $4,600,000.

41.

Plaintiff is entitled to exemplary and punitive damages as a result of AT&T's gross negligence in the amount of $10,000,000.

SEVENTH CLAIM FOR RELIEF

(Negligent Misrepresentation)

42.

Plaintiff realleges paragraphs 1 through 24 as though fully set forth.

43.

As an alternative to Plaintiff's Sixth Claim, Defendant's misrepresentations and conduct as above set forth hereinbefore, were negligent, all to Plaintiff's damage in the sum of $4,600,000.

EIGHTH CLAIM FOR RELIEF
(Breach of Contract)

44.

Plaintiff realleges paragraphs 1 through 24 as though fully set forth.

45.

On October 25, 1989, COT contracted with AT&T for SDN services as set forth hereinbefore at paragraph 16. As a result of the acts as set forth hereinbefore, Defendant has breached this agreement and those entered into subsequently with respect to MLCP and Option VI. Plaintiff has been ready and able to perform on its part. As a result of Defendant's breach, Plaintiff has been damaged in the sum of $4,600,000.

NINTH CLAIM FOR RELIEF
(Breach of the Implied Covenant of Good Faith.)

46.

Plaintiff realleges paragraphs 1 through 24 and 26 of its complaint. The conduct on the part of AT&T described therein has been in breach of its implied covenant of good faith dealing

within the contracts between itself and COT. As a result of Defendant's breach, Plaintiff has been damaged in the sum of $4,600,000.

WHEREFORE, Plaintiff prays for judgment in its favor as follows:

As to its FIRST CLAIM, the sum of $4,600,000, to be trebled, together with its court costs and reasonable attorneys fees.

As to its SECOND CLAIM, the sum of $4,600,000, to be trebled, together with its court costs and reasonable attorneys' fees.

As to its THIRD CLAIM, the sum of $4,600,000, to be trebled, together with its reasonable costs of investigation, expert costs, court costs and reasonable attorneys' fees.

As to its FOURTH CLAIM, the sum of $4,600,000, and exemplary and punitive damages in the sum of $10,000,000, together with its court costs.

As to its FIFTH CLAIM, the sum of $4,600,000, and exemplary and punitive damages in the sum of $10,000,000, together with its court costs.

As to its SIXTH (alternative) CLAIM, the sum of $4,600,000, and exemplary and punitive damages in the sum of $10,000,000, together with its court costs.

As to its SEVENTH (alternative) CLAIM, the sum of $4,600,000, together with hits court costs.

As to its EIGHTH CLAIM, the sum of $4,600,000, together with its court costs.

As to its NINTH CLAIM, the sum of $4,600,000, together with its court costs.

Respectfully submitted,
BRUCE MacGREGOR HALL, P.C.
By: /s/ Bruce M. Hall
Bruce M. Hall, OSB #54038
JAMES DENECKE & HARRIS
J. Richard Urrutia, OSB #82452
Of Attorneys for Plaintiff

Trial Attorney: Bruce M. Hall

DATED: Jan. 26, 1992.
(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CENTRAL OFFICE TELEPHONE, INC.	) Civil Action No. 91-1236 JE
Plaintiff,	) **PLAINTIFF'S FRCP 15 MOTION TO AMEND ITS SECOND AMENDED COMPLAINT TO ADD CLAIMS UNDER THE FEDERAL COMMUNICATIONS ACT OF 1934**
v.	
AMERICAN TELEPHONE & TELEGRAPH COMPANY,	
Defendant.	

Pursuant to Fed. R. Civ. P. 15, plaintiff moves to amend its Amended and Supplemental Complaint by the addition of a claim for violation of the Federal Communications Act, and deletion of prior dismissed claims. Exhibit A, attached hereto, is the proposed amended complaint.

Dated this 22nd day of October, 1993.

BRUCE MacGREGOR HALL, P.C.

By:/s/ Bruce M. Hall
Bruce M. Hall, OSB #54038
Of Attorneys for Plaintiff

(Counsel list omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CENTRAL OFFICE TELEPHONE, INC.,	)	
Plaintiff,	)	CV No. 91-1236-JE
v.	)	PRETRIAL ORDER
AMERICAN TELEPHONE & TELEGRAPH COMPANY,	)	
Defendant.	)	

The following Pretrial Order is lodged with the Court pursuant to Local Rule 235-2.

I. NATURE OF THE ACTION

Central Office Telephone ("COT") alleges five claims: Intentional Interference with Contractual Relations and Prospective Business Advantage; Misrepresentation and Deceit; Gross Negligence; Breach of Contract; and Breach of the Implied Covenant of Good Faith. Trial will be to a jury.

II. SUBJECT MATTER JURISDICTION

This Court has subject matter jurisdiction under 28 USC § 1332.

III. AGREED FACTS (* indicates relevance is disputed)

1. Plaintiff Central Office Telephone Company (COT) is an Oregon corporation with its principal place of business in Oregon. During the relevant time period, COT purchased (and

as a reseller resold) AT&T's Software Defined Network ("SDN") services, and as a reseller used the SDN Service to resell long distance telephone service. Any reference to "reseller" hereinafter includes COT.

2. Defendant American Telephone & Telegraph Company now known at AT&T Corp. ("AT&T"), is a New York corporation, with its principal place of business in New York City.

3. * AT&T is a telecommunications common carrier regulated under the Federal Communications Act as well as under various state laws.

4. SDN service is a virtual private line network service which offers a greater number of features compared to traditional long distance telecommunications services.

IV. COT'S STATEMENT OF FACTS

1. Most services involved in this dispute, including MLP, the MLCP promotion, technical, engineering, marketing, consulting, and other support, ordering, implementation and billing are part of the contractual relationship between these parties, but are not governed by SDN or related tariff provisions.

2. SDN and related tariff provisions are not applicable to this dispute by their terms.

3. Separately, no tariff provisions enacted after October 30, 1989 are applicable to or relevant to the contractual relationship for Phase II entered between AT&T and COT on that date; and no tariff provisions enacted after April 9, 1990 are applicable to or relevant to the contractual relationship for Phase III entered

between AT&T and COT on that date. Further, tariff provisions related to SDN resellers after the subject dates were initiated and implemented in bad faith, and so as to injure COT.

4. COT ordered the Multi-Location Billing (MLB) option under SDN from AT&T; but AT&T placed COT on Location Account Billing Option (LABO), and did not provide other specified features, such as the SND calling card.

5. AT&T failed to perform the ordering, provisioning and billing functions of SDN service in timely manner, and in some instances, at all for COT.

6. As to ordering, AT&T failed to give COT proper instructions to process or correct customer numbers, to identify customers, and to take other necessary steps to make implementation and provisioning of SDN service timely and effective.

7. Separately, as to implementation and provisioning, AT&T failed to cause its provisioning service to function correctly and to interact effectively with other SDN procedures, such as billing.

8. As to billing, AT&T variously lost, misapplied and converted COT customers, and because of these failures and these failures described above, had no basis for and did not provide the discount allocation promised under EVP and MLCP.

9. AT&T "parked" COT on Multi-Location Calling Plan (MLCP) because the underlying services promised were not yet provided; but this service too failed through non-application of its promised 10% discount to AT&T; non-crediting against COT's SDN minutes commitment of minutes on MLCP; and non-identification to COT of its MLCP customers.

10. AT&T provided a lower level of the services identified in paragraph 1 to COT than COT was originally provided under its Phase II and Phase VI agreements and than AT&T provided for itself and commercial customers in competition with plaintiff. AT&T also implemented internal disincentives for such services through inadequate training and compensation to personnel involved with SDN resellers.

11. As set forth in plaintiff's Supplemental and Amended Complaint, AT&T materially misstated the services it described to COT in contracting for Phases II and VI of SDN, as well as omitted advising COT of AT&T's unwillingness and inability to provide such services.

12. AT&T deliberately and in bad faith, as directed by CDOC, Product Management and other authorities influencing and directing AT&T policy, programs and actions towards resellers, failed to provide the SDN service contracted for by COT, and misused tariff provisions so as to injure COT and other resellers.

13. AT&T's actions, errors and omissions, as described above and each of them, contributed to the damages to be set forth in plaintiff's damages schedules.

V. AT&T'S STATEMENT OF FACTS

1. Plaintiff Central Office Telephone is an Oregon corporation with its principal place of business in Oregon.

2. Defendant is a federally regulated telecommunications common carrier.

3. Defendant's tariff FCC No. 1 defines the terms and conditions of the service AT&T provides to customers

subscribing to long distance message telephone service (LDMTS).

4. Defendant's software defined network or "SDN" service is a LDMTS.

5. Plaintiff subscribed to SDN service on October 30, 1989, under the terms of the Subscription Agreement executed by plaintiff on that date.

6. Plaintiff was defendant's "customer" as defined by AT&T's tariff FCC No. 1.

7. Before subscribing to SDN, plaintiff knew defendant offered SDN only pursuant to the terms of AT&T's tariff FCC No. 1.

8. Plaintiff considered the terms of AT&T's tariff FCC No. 1 before subscribing to SDN.

9. Plaintiff carefully evaluated SDN service before subscribing.

10. Defendant terminated plaintiff's SDN service on September 30, 1992.

11. Plaintiffs selected multilocation billing (MLB).

12. AT&T's tariff FCC No. 1 permits defendant to require a deposit from customers without an established payment history.

13. Plaintiff knew that AT&T's tariff FCC No. 1 permitted defendant to require a deposit from customers without an established payment history.

14. Defendant placed no limit on the number of orders per month an SDN subscriber could submit in October 1989.

15. In April 1990, defendant implemented a policy limiting to 400 locations per month the number of orders an SDN subscriber could submit.

VI. CLAIMS AND DEFENSES

A. Fourth Claim Relief: Intentional Interference with Contractual Relationships and Prospective Business Advantage.

1. COT contends:

(a) AT&T set out to eliminate COT and other resellers, and to benefit itself and its commercial customers in violation of law by intentionally failing to provide services it had promised for the benefit of COT's customers, including correct ordering procedures and actions; by intentionally delaying provisioning of COT's customers; by intentionally failing to provide proper or any billing to COT's customers; by intentionally slamming and misappropriating COT's customers; by intentionally refusing to make any explanation to COT's customers as to its conduct; and by setting up other roadblocks to COT's and its customers' successful use of SDN; all to COT's injury.

(b) AT&T's intentional interference with COT's contractual relationships and prospective business advantage caused or contributed to the damages to be set forth in plaintiff's damages schedules.

2. AT&T contends:

(a) COT's interference claim fails because there is no evidence that AT&T intended to interfere with COT's contracts with its customers, the SDN end locations, by intentionally creating provisioning problems and billing delays and then intentionally failing to remedy those problems for the purpose of interfering or with the knowledge that interference was substantially certain to occur.

(b) COT's interference claim fails because AT&T did not use improper means of interference.

(c) COT's interference claim fails because AT&T did not act for an improper motive.

B. Fifth Claim for Relief: Misrepresentation and Deceit.

1. COT contends:

(a) AT&T made the following misrepresentations to COT as to AT&T's SDN services as to both Phases II and VI, upon which AT&T knew or reasonably should have known, COT would and did rely:

(i) AT&T would bill COT's customers and collect revenues from them in accordance with instructions from COT in behalf of COT, and remit to COT its designated share of discount.

(ii) AT&T had filed a tariff which would provide for the proper functioning of the proffered SDN program when purchased by third parties such as COT.

(iii) That SDN programs selected by COT under Phase II in October, 1989 and under Phase VI in April, 1990 would

continue in accordance with their stated terms and conditions during the term of each agreement.

(iv) That there would be no deposit.

(v) That there would be no restriction on the number of customers COT could place on SDN.

(vi) That AT&T would permit use of the SDN Calling Card (Credit Card) and that COT customers could use this card to make calls to any international location as well as originate calls from any "U.S. Direct" country.

(vii) That AT&T would make up the initial printing of SDN Calling Cards with both the AT&T and COT logo printed on them.

(viii) That AT&T would furnish timely billings and "call detail" to or for the benefit of COT SDN customers; and would make timely payment to COT.

(ix) AT&T could allocate any fixed percentage of a corollary plan entitled the Expanded Volume Plan (EVP) to each of the COT SDN customer locations based on the relative calling volume affected by the EVP.

(b) AT&T's misrepresentations and deceit caused or contributed to the damages to be set forth in plaintiff's damages schedules.

2. AT&T contends:

(a) October 1989 Subscription Agreement.

(i) AT&T did not make false statements about billing, the tariff, call detail, discount allocation, availability of calling cards, deposits, or the 400 per month limitation implemented in April 1990, prior to COT's decision to subscribe to SDN.

(ii) Incorrect statements about the availability of calling cards were not material to COT's decision to subscribe to SDN.

(iii) AT&T's alleged failure to tell COT that call detail would be sent in a statement separate from the bill or that COT could and/or would be required to post a security deposit were not material to COT's decision to subscribe to SDN.

(iv) In 1989, AT&T placed no limit on the number of end location orders COT, or any SDN subscriber, could submit per month.

(v) COT's fraud claim fails because AT&T did not intend COT to rely on any oral or written statements of AT&T, but rather AT&T intended that COT rely exclusively on the tariff.

(vi) COT's fraud claim fails because COT did not rely, nor had any right to rely on oral or written statements or omissions by AT&T, but rather COT relied and, by law, had the right to rely only on the tariff.

(vii) COT's fraud claim fails because AT&T's oral and written statements or omissions were a not a substantial contributing cause of COT's alleged damages.

(b) April 1990 Subscription Upgrade.

(i) COT's fraud claim fails because there is no evidence that AT&T made false statements about billing, the tariff, call detail, discount allocation, calling cards, deposits, or the 400 per month limitation implemented in April 1990.

(ii) There is no evidence that incorrect statements regarding the calling card were material.

(iii) There is no evidence that AT&T's failure to tell COT that call detail would be sent in a statement separate from the bill or that COT could and/or would be required to post a security deposit was material.

(iv) COT's fraud claim fails because there is no evidence that AT&T intended COT to rely on any oral or written statements of AT&T, but rather AT&T intended that COT rely exclusively on the tariff.

(v) COT's fraud claim fails because there is no evidence that COT relied or had the right to rely on oral or written statements or omissions by AT&T, but rather COT relied and could, by law, rely only on the tariff.

(vi) COT's fraud claim fails because there is no evidence that AT&T's oral and written statements or omissions were a substantial contributing cause of COT's alleged damages.

C. Sixth Claim for Relief: Gross Negligence.

1. COT contends:

All of the grounds set forth in COT's Fourth Claim alternatively amount to gross negligence towards COT and

wilful disregard of its rights, all to COT's injury as set forth hereinbefore.

2. AT&T contends:

COT's claim for "gross negligence" fails to state a separate claim for relief. Rather, this claim is an alternative theory of recovery for fraud, and fails for the reasons set forth in Section B. above. (See, Opinion on Summary Judgment.)

D. Eighth Claim for Relief: Breach of Contract.

1. COT contends:

AT&T breached both its Phase II and Phase VI contracts by:

(a) Failing to provide the options and services COT requested, and AT&T agreed to provide.

(b) Failing to process orders for COT for its SDN customers in a timely and agreed upon manner.

(c) Failing to install and implement SDN for COT for its SDN customers in a timely and agreed upon manner.

(d) Failing to correctly, or at all, bill COT's customers.

(e) All the foregoing to COT's injury, as set forth hereinbefore.

2. AT&T contends:

(a) COT's contract claim is barred by the filed tariff doctrine. COT cannot assert a claim for breach of contract

because the filed tariff doctrine limits the duties and obligations between AT&T and COT to those specified in AT&T's tariff FCC No. 1.

(b) COT does not allege that AT&T violated AT&T's tariff FCC No. 1.

(c) There is no evidence that AT&T violated AT&T's tariff FCC No. 1.

E. Ninth Claim for Relief: Breach of the Implied Covenant of Good Faith.

1. COT contends:

(a) The breaches of contract set forth under D.1. were undertaken in bad faith.

(b) SDN tariff changes were introduced to the detriment of resellers.

(c) In addition, the slamming and misappropriation of COT customers were undertaken in bad faith, all to COT's injury, as set forth hereinbefore.

2. AT&T contends:

(a) COT's good faith contract claim is barred by the filed tariff doctrine.

(b) Under Oregon law, the covenant of good faith and fair dealing cannot be used to impose or imply a duty in addition to or inconsistent with any provision of the underlying contract, and because the terms of the tariff are the exclusive source of the obligations and duties of the parties with respect

to a tariffed service, this claim fails because Oregon law will not imply terms or duties to alter or supplement the tariff terms.

F. Counterclaim.

1. AT&T contends:

(a) COT incurred tariff charges for long distance usage, or "toll charges," and it has an outstanding balance on its SDN account.

(b) Pursuant to AT&T's tariff FCC No. 1 and the parties' subscription agreements, COT is liable for payment for services rendered in the amount of $199,399.86 for toll charges.

(c) Pursuant to the terms of AT&T's tariff FCC No. 1, COT is liable for shortfall charges in the amount of $193,542.96 and minimum service commitment charges of $4,166.77. This amount is calculable according to a formula in the tariff, and if AT&T prevails on its counterclaim for toll charges, the court must enter an amount for shortfall charges in the amount of $193,542.96, on toll charges of $199,399.86. Consideration of the shortfall charges is withdrawn from the jury.

(d) Pursuant to the terms of AT&T's tariff FCC No. 1, COT is liable for termination charges in the amount of $631,169.35. This amount is calculable according to a formula in the tariff, and if AT&T prevails on its counterclaim for toll charges, the court must enter an amount for termination charges in the amount of $631,169.35, on toll charges of $199,399.86. Consideration of the termination charges is withdrawn from the jury.

2. COT contends:

(a) As a matter of law, and of fact, AT&T breached its contract and failed to perform its SDN obligations as promised - a condition precedent to any liability on the part of COT.

(b) AT&T cannot demonstrate factually that there is any foundation for its counterclaim.

(c) AT&T has not provided the basis for its counterclaim.

(d) See Section VIII A.3. infra.

G. First Affirmative Defense: Filed Tariff Doctrine.

1. AT&T contends COT's contract claims are barred by the filed tariff doctrine. The Subscription Agreements specifically provide that the parties' relationship is governed solely by the terms of tariff AT&T FCC No. 1.

2. COT contends:

The filed tariff doctrine is not applicable to the case (Order in Summary Judgment).

H. Second Affirmative Defense: Unconstitutionality of Punitive Damages.

1. AT&T contends:

Punitive damages for speech related conduct violate the Oregon constitution.

2. COT contends:

Punitive damages are constitutional.

I. Third Affirmative Defense: Accord and Satisfaction.

1. AT&T contends:

(a) To the extent any of COT's claims are based on allegations about deficiencies in MLCP service, those claims are barred by the subsequent agreement of the parties. COT and AT&T reached an accord on the amount of MLCP revenue to which COT was entitled and AT&T satisfied the parties' agreement by crediting COT's account in the proper amount.

2. COT contends:

AT&T promised, as part of the prepared accord, that it would pay the above sum in cash or provide meaningful credit. AT&T did neither, but instead applied a "credit" to meaningless and fouled accounting. In any event, the facts relating to the failure of MLCP are admissible as to liability.

VII. OTHER LEGAL ISSUES

VIII. PROPOSED AMENDMENTS TO THE PLEADINGS

A. COT

1. COT proposes the remaining claims in this case be renumbered as follows: Fourth to become First; Fifth to become Second; Sixth to become Third; Eighth to become Fourth; Ninth to become Fifth.

2. The damages should be modified in accordance with COT's damage schedules, which were submitted as plaintiff's exhibits 251-264.

3. AT&T should not be allowed to withdraw from jury consideration its counterclaims for shortfall and termination charges, as well as for minimum service commitment charges, so long as AT&T asserts its contentions under F.1.(c) and (d). AT&T must either dismiss with prejudice these three (3) components of its counterclaim or have them considered by the jury.

B. AT&T

1. AT&T withdraws its counterclaim for shortfall charges from jury consideration.

2. AT&T withdraws its counterclaim for termination charges from jury consideration.

3. AT&T withdraws its counterclaim for minimum service commitment charges from jury consideration.

Submitted by:

BALL, JANIK & NOVACK

By /s/ Bruce M. Hall
Bruce M. Hall, OSB #54038
Of Attorneys for Plaintiff

By /s/ Wayne Hilliard
Wayne Hilliard, OSB #51048
Of Attorneys for Defendant

Dated: June __/__, 1994.

(Certificate of Service omitted in printing)

[ER 1222; Tr. 1029, lines 5-25]
Spencer Perry Testimony

Q. What did Mr. Keith tell you to tell him? I know it's your words, but what did he want you to do?

A. He was looking for a recommendation from, from the aad hoc group to modify SDN to kill arbitrage.

Q. Now, what did Mr. Keith state to you, that caused you tto write down the words that way?

A. What were his exact words?

Q. Well, what did he say, yeah.

A. My recollection is that this meeting came after the, the meeting where I showed him that chart that I had told you about, that showed the different AT&T services, and the percent discounts, and the cost of calls.

Q. This is the arbitrage you were talking about?

A. That's right.

Q. Okay. Would you tell us, though, what Mr. Keith told you, so that you wrote down what you did?

A. He, you know -- well, I don't understand -- are you asking me to tell you specifically what he said, because --

Q. All right. Let me just state it this way. Arbitrage we talked about earlier. You explained that. But to kill arbitrage, did you state the word kill arbitrage?

[ER 1223; Tr. 1030, lines 1-11]
Spencer Perry Testimony

A. I see your point.

Q. Yeah.

A. Well, it was clear to me, after I first showed him that one chart, that he wanted us to somehow -- wanted AT&T to modify SDN, so that we wouldn't have switchless resellers in it. So what we had to do is somehow modify the service offering in a way that we would remove the viability of the service for switchless resellers.

Q. And that was your understanding of what he told you at this meeting?

A. That's correct.

[ER 1381; Tr. 1187, lines 7-25]
Michael Keith Deposition Testimony

Q. Would you state your name, please, sir?

A. Michael George Keith.

Q. Mr. Keith, how are you employed?

A. I am a regional vice-president for AT&T.

Q. How long have you been employed by AT&T?

A. It will be 17 years this summer in June.

Q. What have you done to prepare yourself for testimony in this case?

A. I have worked with my lawyers and reviewed depositions and documents.

Q. I want to know, from your perspective in the company, your areas of responsibility in the spring of 1990, whether SDN resellers were your customers or your competitors?

A. In the spring of 1990, I was responsible and led a sales force that sold to the resellers. So for that responsibility, they were my customers.

Q. And when I asked you that before, until you realized that I had the BSD Today article, you said five times, under oath, that you considered them to be your customers, ...

[ER 1382; Tr. 1188]
Michael Keith Deposition Testimony

... didn't you?

A. That's right.

Q. Now, this is your picture on the front page of Plaintiff's Trial Exhibit 87, is it not?

A. That's correct.

Q. And this is a publication published by AT&T, correct?

A. That's correct.

Q. And it contains an interview with you, right?

A. That's correct.

Q. AT&T people were asking the questions, and you, as a AT&T executive, were answering the questions?

A. That's right.

Q. And the headline is in quotation marks, and that is an accurate quote of what you said, right?

A. Yes.

Q. And what did you say?

A. Resellers aren't alternate channels. They are competitors.

Q. Okay. So you recognized they had both -- they were both competitors?

A. Right.

Q. And --

A. Right.

Q. -- customers, right?

A. Right.

[ER 1767; Tr. 1561, lines 2-25]
Maggie Brennan-Lasard Deposition Testimony

Q. We are here today to take your deposition in connection with the case, because you are someone who has been designated by AT&T as an expert with certain areas of expertise. Did you understand you were designated as an expert?

A. Yes.

Q. Okay. Go to the next page. How long have you worked for AT&T?

A. Twenty-one years.

Q. In the 21 years, have you held various, various positions or worked in various areas of AT&T?

A. Yes, I have.

Q. Can you sort of give me a little thumbnail sketch of your career at AT&T?

A. I worked in the tariffs and cost divisions back in the early, late '70's, middle to late '70's, and from there I moved into what they call the external affairs organization. And from there I moved into we they called the strategic pricing organization or state pricing organization.

Q. State?

A. State pricing organization.

Q. Spell that first word.

A. S-T-A-T-E.

[ER 1774; Tr. 1568, lines 2-19]
Maggie Brennan-Lasard Deposition Testimony

A. The SDN users association is comprised of commercial customers.

Q. Is there anything in the FCC Tariff No. 1 that pertains to billing policies for SDN networks?

A. What do you mean by billing policies?

Q. Yes, ma'am. What I mean is how you bill folks for the time that they spend on the telephone, if they are on a SDN network?

A. You mean the rates that we charge them?

Q. No, I don't mean the rates. I mean how you get them to pay those rates. In other words, sending them a telephone bill. Are there policies that -- as to what kind of bill you will send them, will it be detailed, will it be itemized, et cetera, et cetera?

A. That information is not in the tariff.

Q. Okay. Is there anything in the tariff about provisioning of SDN networks?

A. Not to my knowledge.

(Counsel address omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CENTRAL OFFICE TELEPHONE, INC.,	) CV No. 91-1236-JE
Plaintiff,	) COT'S RENEWED
v.	) MOTION TO ADMIT
AMERICAN TELEPHONE & TELEGRAPH COMPANY,	) EVIDENCE OF AT&T'S FINANCIAL
Defendant.	) CONDITION
	) (ORS 41.315)

* * *

[Exhibit to Motion]

Following is a review of some requirements and conditions for SDN.

- The average start up for SDN is four months from receit of deposit until first customer is turned up.

- The deposit requirements are based upon the number of annual minute commitment and/or the number of customers on the network.

- No provisioning is started until deposit is received.

- The customer is responsible for all ANI collection and dispute resolution on switched access location.

- AT&T will interface with the end users equipment vendor/technician for customers requiring special access.

- There is currently a limitation of 400 switched access locations that can be added, changed or deleted per SDN per month.

- Dedicated access locations have separate, individual intervals.

- There is a limitation of 70,000 calling card numbers and 125,000 authorization numbers per customer. A bulk issuance agreement is needed for calling card number.

- There is a dedicated AT&T technician assigned to each SDN through the AT&T SDN Control Center in Atlanta, GA.

- Cockroaches and slime and convicts need not apply.

[Exhibit to Motion; original handwritten]

March 6, 1990
Mike Keith Staff Mtg

To Do List

* Profile SDN resellers by every which way (Need to develop standard profile template)
* Segment by resellers
* John Greco charges: looking for recommendation from ad hoc group to modify SDN to kill arbitrage
* Report of SDN results:
  "Sales funnel approach"
  UED & #ORDERS
  in/out/chg

---

* Brimis rpt for each customer (SDN)

MGK 5/6/90

* Optimize as soon as we can - immediately
  Do we do this with resellers?
* Develop productivity / AE on each AE: sales . . . revenue
* Develop plans for SDN targeting & strategy to traditional resellers & deflect cockroaches.

[ER 3247]

AT&T'S REQUESTED JURY INSTRUCTION NO. 28

AT&T's tariff governs all aspects of AT&T's relationship with COT. The tariff specifies that AT&T cannot be held liable for damages of the sort COT seeks here unless you find that AT&T has engaged in willful misconduct. Therefore, you may not award COT damages unless you find that AT&T engaged in wilful misconduct toward COT.

TO THE COURT: AT&T Tariff FCC No. 1, Section 2.3.1.A
(Ex 504, p 3)

Carter v. American Telephone & Telegraph Company,
365 F2d 486, 496 (5th Cir 1966), cert denied
385 US 1008 (1967)

MCI Telecommunications Corporation v. Premium Marketing Systems, Inc.
1992 WL 6693, *2 (ND Ill 1992) (copy attached)

Video Education Career Institute v. American Telephone and Telegraph Co.,
1990 WL 137297, *2 (D Mass 1990) (copy attached)

[ER 3324 through 3338; Tr. 14-41 through 14-54]

JURY INSTRUCTIONS

THE COURT: Counsel, one thing on the agreed facts which I read to the jury, I actually had intended just to read those rather than give them a set. The final set I had were not in a form because of some last-minute pen-and-ink changes. If you have them on a word processor and can plug in those modifications, I'd be happy to give the jury a set of them. It's just that I don't physically have mine in a form that can be done.

So, ladies and gentlemen of the jury, I read those to you. You might or might not be getting a set in writing. Apparently, we didn't have a real clear understanding on that. If it's possible to do that and get them to you, I will.

But it's now your duty to decide the facts and reach your decision. I'll give you a set, so you can each read along with me if you'd like. You'll each have a set of instructions to refer back to later in the jury room to the extent that you would like to.

(clerk handing)

THE COURT: Okay. We'll start, then, with paragraph two. I'll tell you the legal rules which you must follow in reaching your decision. Although you may think the law is or should be different, you are bound by your oath to apply the law that I give to you. Your decision must be based solely on the evidence. Do not allow bias, prejudice, or sympathy to influence you.

The evidence consists of the witnesses' live and deposition testimony, the exhibits you will have in the jury room, and the facts to which the parties have agreed. The comments of the

attorneys are not evidence. If your recollection of the evidence differs from that of the attorneys, rely upon your own memory.

You are the judges of whether the witnesses were telling the truth when they testified. You must presume that each witness told the truth, but you are free to decide otherwise based on the manner in which the witness testified, the character, motive, or bias of the witness, or if there was other evidence which you believe. If you find that a witness intentionally lied in one part of his or her testimony, you're free to disregard anything else that witness said. You are the judges of how much weight a witness's testimony deserves.

In considering testimony, you're permitted to form reasonable conclusions by using your good common sense. You should not decide a fact merely by counting the number of witnesses or exhibits. The testimony of one witness whom you believe is enough to prove any fact in dispute.

There are two types of evidence. One is direct evidence, such as the testimony of an eye witness. The other is circumstantial evidence, the proof of a chain of circumstances pointing to the existence or nonexistence of a certain fact. Proof may be either type or both.

In evaluating the evidence, you may consider the power of each side to produce evidence. If weaker and less satisfactory evidence is offered by either party when it appears to you that stronger and more satisfactory evidence was within the power of the party to produce, the evidence offered should be viewed with distrust.

An expert witness may give an opinion on any matter in which that witness has special knowledge, skill, experience, training, or education. You should consider the qualifications

and credibility of the expert witness and the reasons given for the opinions. You are not bound by the opinions. Give them the weight, if any, to which you consider them entitled.

Each party must prove its claims by a preponderance of the evidence. Preponderance of the evidence means the greater weight of evidence. It is such evidence that, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any question in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs more heavily, you must resolve that question against the party upon whom the burden of proof rests.

A corporation can act only through its officers, agents, or employees. In this case if any officers, agents, or employees of the parties engaged in conduct as charged against them, such conduct is to be treated as the act of the party if within the scope of such person's authority.

The plaintiff, COT, asserts two claims against AT&T. AT&T denies each claim. I will summarize the claims you'll be required to decide, and then I will instruct you specifically on the law applicable to each claim. First, COT asserts that AT&T breached its subscription agreements in several ways. COT contends that AT&T breached the contract of April 9th, 1990, in one or more of the following respects:

One, by failing to present a service, SDN, which was functional for COT. Two, by failing to support SDN by provisioning in a reasonable manner. Three, by failing to support SDN by installing in a reasonable manner. Four, by failing to support SDN by billing in a reasonable manner. Five, by placing COT on location account billing, LABO, rather than multilocation billing, MLB.

Six, by failing to afford COT international calling capability in a reasonable call completion rate under NRI I. Seven, by failing to allocate discounts as directed by COT between COT and its customers. Eight, by failing to provide timely call detail to COT and its customers. Nine, by requiring a security deposit from COT. And, ten, by failing to provide COT with equal access to SDN.

COT contends that AT&T breached the agreement for MLCP of March 8th, 1990, in one or more of the following respects:

One, by failing to provide a service, MLCP, which was functional for COT. Two, by failing to support its MLCP service by provisioning in a reasonable manner. Three, by failing to support its MLCP service by installing in a reasonable manner. Four, by failing to support its MLCP service by billing in a reasonable manner. Five, by failing to credit minutes used by COT on MLCP to COT's SDN minutes usage commitments. Six, by failing to credit COT with a 10 percent MLCP discount in a reasonable manner, and seven, by failing to provide COT with equal access to MLCP.

Second, in addition to the contract claim, COT asserts that AT&T intentionally interfered with COT's contracts and prospective business relations with COT's customers. COT claims it was damaged as a result of AT&T's conduct in connection with each claim. COT seeks to recover lost profits.

Defendant AT&T denies each of COT's assertions. COT -- or, excuse me, AT&T also makes a claim against COT for charges associated with COT's use of AT&T's long distance service.

I'll first explain COT's breach of contract claim. COT and AT&T had three agreements under which COT agreed to purchase and AT&T agreed to provide certain long distance services. It will be your responsibility to determine the terms and conditions of the agreements. You will also need to determine whether AT&T failed to perform in accordance with the agreements and whether it is liable for failing to perform.

The terms of any applicable tariffs control the duties and rights of the parties. In other words, the parties could not make an agreement that was contrary to the terms of an applicable tariff. In this regard, I instruct you that there is tariff language which limits AT&T's liability. Under that language, AT&T may be liable to COT for breach of contract only if AT&T engaged in willful misconduct. To put it another way, the tariff specifically limits AT&T's potential liability, and COT cannot recover an award of dollar damages on its contract claim in the absence of willful misconduct on the part of AT&T.

Willful misconduct is defined as an intentional act or omission performed either with the knowledge that the act or omission will probably harm someone else, or in a manner that implies reckless disregard of probable consequences to others. In determining the terms and conditions of the parties' agreements, you're to consider the three subscription agreements submitted in evidence as exhibits 39, 66, and 77.

You may also consider any oral statements or written documents which were made or furnished before the parties signed the various agreements if you find that the parties intended that those statements or written materials formed part of their agreements.

* * *

THE COURT: You may also consider any oral statements or written documents which were made or furnished before the parties signed the various agreements if you find that the parties intended that those statements or written materials form part of their agreements. You may consider any statements or written materials furnished after the agreements were signed only to the extent they might be helpful in interpreting the terms and conditions to which the parties agreed.

As part of its breach of contract claim, COT alleges that AT&T breached the implied covenant of good faith and fair dealing. Every contract contains an implied covenant of good faith and fair dealing. In addition to complying with the express terms of a contract, each party has an obligation to deal with the other party to the contract in good faith. A party to a contract performs in bad faith if that party carries out the contract in such a way that it unreasonably and unfairly makes it difficult or impossible for the other party to carry out the contract and receive its benefits.

In its second claim, COT asserts that AT&T intentionally interfered with its business relations and expectations of future business relations with its customers, the end users of its SDN service. In order to prevail on this claim, COT must prove by a preponderance of the evidence, one, that COT had business relations with the probability of future economic benefit. Two, that AT&T was aware of the relationships and expectation of future benefits. Three, that AT&T intentionally interfered with COT's business relations. Four, that AT&T interfered for an improper motive or by using improper means. And, five, that COT suffered economic injury as a result of the interference.

AT&T makes a claim -- it's been referred to here as a counterclaim -- against COT for amounts it claims COT owes pursuant to the terms of the tariff in four parts, toll charges,

termination charges, shortfall charges, and minimum service period commitment charges. COT denies these claims. In order to prevail on any of these claims, AT&T must prove by a preponderance of the evidence that it is entitled to recover these charges from COT.

If you find from the evidence and instructions that either party is entitled to prevail on its claim or claims, then it becomes your duty to decide the amount of its damages. Damages which COT may recover are objectively verifiable monetary losses incurred by COT. In determining the amount of damages, if any, consider the amount of lost profits, past, present and future, sustained by COT because of AT&T's conduct.

One who has suffered damage has a duty to exercise reasonable care to avoid increasing that damage. There can be no recovery for increased damage caused by the failure to exercise such care. You're not to consider the mere fact that I'm instructing you with regard to the measure of damages as an attempt by me to suggest or indicate that you should or should not award damages. That's entirely within your province as jurors to make those decisions in this case.

Your decision must be based on the considered judgment of each of you. All of you must agree with the decision. You must talk with one another with the idea of reaching an agreement if you can do so based on your own judgment. You must each decide the case for yourself, but do not reach a decision until you've impartially considered the evidence in the case with your fellow jurors. Do not hesitate to reexamine your views or change your mind if you become convinced you are wrong, but do not change your mind about the effect or credibility of the evidence solely because your fellow jurors

disagree with you or because you want to reach a unanimous decision.

When you go to the jury room, select a presiding juror. The presiding juror shall preside over the deliberations but has no greater voice than any other juror. A verdict form has been prepared for your use. It will be with you in the jury room. It's a relatively simple form. Omitting the caption, it reads, we, the jury, being duly impaneled and sworn to try the issues in this case return our verdict as follows. Then it has a series of numbered paragraphs.

One, on plaintiff, COT's, claim for breach of contract, we find, and then there are two options for you to check. One reads, in favor of plaintiff, COT, the second reads, in favor of defendant, AT&T.

The second paragraph reads, on plaintiff, COT's, claim for intentional interference with business relations, we find, and, then, again, line to check in favor of plaintiff COT, a line to check in favor of defendant AT&T.

The instructions on the form, then, read if you find in favor of COT on either of the above claims, answer question three. Question three really isn't a question. I note now it's a paragraph. Damages are awarded to COT against AT&T in the amount of blank.

Then there's a paragraph four, reads on defendant AT&T's counterclaim, we find, then again there are two lines to check, one or the other. The first one reads, in favor of AT&T and award damages in the amount of blank. And the second reads, in favor of COT.

And you're to evaluate the claims independently. They overlap. The evidence overlaps, but the claims are separate and distinct claims made each way by each party. So it's certainly theoretically possible that you could find in favor on each party as to each of its claims, you could find against each party on each of its claims, or you could find one way or the other in favor of one and against the other. But, the point being, that you evaluate the claims separately that each of the parties are making against the other, keeping in mind that each of the parties has the burden of proof as to its claims for dollar damages.

When you've reached a unanimous agreement as to your verdict, the presiding juror should fill in, date, and sign the form to state the verdict upon which you unanimously agree. You will then return your verdict to the courtroom.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by a bailiff signed by your presiding juror or by one or more of the jury. Bear in mind that -- also, that you are not to reveal to anyone how the jury stands, numerically or otherwise, on the questions before you until after you've reached a unanimous verdict.

Okay. From this point forward, you will be together. Michelle will make arrangements to have lunch brought in for you. If there are any special problems, be sure and let her know, or there might possibly be someone on duty if she has some brief periods of absence.

I can't in any way comment on the facts in the case. It's entirely up to you to resolve the facts. It is my job, though, to give you proper guidance and to explain the rules to you, and I've attempted to do that in as simple a way as possible in what is a fairly complex case. If I've said anything in the rules of law

here that you think are hopelessly confusing or that, by going back to the jury room and discussing it, reading back through my instructions, you just don't feel that you understand what I've said, I'd be happy to explain that to you in more detail if I said anything that was confusing to you.

[ER 3344; Tr. 14-60, lines 2-25]

Instruction number 28 is a statement of the willful misconduct. And I don't know that there's a distinct difference, but we do object to the failure to give the form as submitted. The authorities are there.

THE COURT: I can't remember if yours really differed in any significant way.

MS. STALEY: Let me take a look.

THE LAW CLERK: It didn't.

MS. STALEY: Let me compare these side-by-side. One minute, Your Honor.

MR. PETRANOVICH: Your Honor, it appears to us that the Court's formulation of willful misconduct standard, which is expressed in four subelements in our requested jury instruction number 29, is adequately reflected in two subelements in the Court's instruction. But we except to the failure of the Court to direct that merely negligent service is not willful misconduct.

MS. STALEY: That was proposed instruction 29, Your Honor.

AT&T takes exception to the failure to instruct in accordance with our proposed instruction number 30, again relating to willful misconduct. And this states the fact mere violation of the tariff is not willful misconduct. And that's related to the -- instruction

[ER 4681]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CENTRAL OFFICE TELEPHONE, INC.,	)	
Plaintiff,	)	CV No. 91-1236-JE
v.	)	VERDICT
AMERICAN TELEPHONE & TELEGRAPH COMPANY,	)	
Defendant.	)	

We, the jury, being duly empaneled and sworn to try the issues in this case, return our verdict as follows:

1. On plaintiff COT's claim for Breach of Contract we find:

__√__ In favor of plaintiff COT.

_____ In favor of defendant AT&T.

2. On plaintiff COT's claim for Intentional Interference with business relations we find:

__√__ In favor of plaintiff COT.

_____ In favor of defendant AT&T.

If you find in favor of COT on either of the above claims, answer question 3.

3. Damages are awarded to COT against AT&T in the amount of $ /13,000,000.00/ .

* * * * * * * * * * * * * *

4. On defendant AT&T's counterclaim, we find:

_____ In favor of AT&T, and award damages in the amount of $_____.

/s/ In favor of COT.

DATED this 29th of June, 1994.

/s/ Linda C. Fitz-Armstrong
Presiding Juror

(Order List: 522 U.S.)

FRIDAY, DECEMBER 12, 1997

CERTIORARI GRANTED

97-679 AT&T V. CENTRAL OFFICE TELEPHONE

The motion of United States Telephone Association, et al. for leave to file a brief as *amici curiae* is granted. The petition for a writ of certiorari is granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, January 23, 1998. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 20, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 18, 1998. Rule 29.2 does not apply. Justice O'Connor took no part in the consideration or decision of this motion and this petition.

(6)

Supreme Court, U.S.
FILED
JAN 23 1998
CLERK

No. 97-679

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP.,
Petitioner,

v.

CENTRAL OFFICE TELEPHONE, INC.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF PETITIONER AT&T CORP.

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January 23, 1998

78 pp

QUESTION PRESENTED

Whether, consistent with a line of decisions from this Court extending from *Chicago & Alton R.R.* v. *Kirby*, 225 U.S. 155 (1912), and *Davis* v. *Cornwell*, 264 U.S. 560 (1924), to *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), and *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U.S. 218 (1994), the federal filed tariff requirements of Section 203 of the Communications Act of 1934 preempt state law claims that a customer of a regulated common carrier is entitled to better, costlier, and more valuable services than required by the terms of the governing tariff, and received by similarly situated customers?

LIST OF PARTIES AND AFFILIATES

The parties listed on the caption were the only parties to the proceedings below. American Telephone and Telegraph Co. has, since the inception of this case, changed its name to AT&T Corp.

Pursuant to Supreme Court Rule 29.6, AT&T Corp. declares that it has no parent. AT&T Corp. has an equity interest in the following publicly traded companies:

LIN Television Corporation;
American Mobile Satellite Corporation;
PriCellular, Inc.;
General Magic, Inc.;
Novell, Inc.;
Lanser Wireless Inc. (Canada); and
SmartTone Telecommunications Holdings Ltd. (Hong Kong).

AT&T Corp. owns an interest in the following non-publicly traded company, which has public debt outstanding:

AT&T Credit Holdings, Inc.

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No. 97-679

In The
Supreme Court of the United States
October Term, 1997

AT&T CORP.,

Petitioner,

v.

CENTRAL OFFICE TELEPHONE, INC.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF FOR PETITIONER AT&T CORP.

OPINIONS BELOW

The opinion of the court of appeals (Appendix to Petition for Certiorari ("Petn.") 1a-30a) is reported at 108 F.3d 981. The order of the court of appeals denying AT&T Corp.'s petition for rehearing and suggestion for rehearing en banc (Petn. 49a) is unreported. The order of the United States District Court for the District of Oregon entering judgment on a jury verdict for Central Office Telephone, Inc., and dismissing AT&T Corp.'s counterclaims (Petn. 48a) is unreported. The decision and opinion of the district court amending its judgment (Petn. 31a-47a) is also unreported.

JURISDICTION

The order of the court of appeals denying AT&T Corp.'s petition for rehearing was entered on July 18, 1997. AT&T Corp. filed its petition for a writ of certiorari on October 16, 1997. This Court granted AT&T Corp.'s petition on December 12, 1997. Joint Appendix ("J.A.") 79. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of Sections 201-208 of the Communications Act of 1934, 47 U.S.C. §§ 201-208, are reproduced in the Appendix ("App.") to this brief. Relevant portions of AT&T Tariff F.C.C. No. 1 are also reproduced in the Appendix.

STATEMENT OF THE CASE

Respondent Central Office Telephone, Inc. ("COT") is one of the nation's many "resellers" of long distance telephone services. Such firms purchase volume discounted or other long distance services that are designed for large customers and then "resell" these services at marked-up rates to smaller customers.

Between 1990 and 1992, COT purchased a long distance service offered by petitioner AT&T that is called Software Defined Network ("SDN"). SDN had formerly been used only by large corporate customers, but COT is one of some 100 resellers who ordered SDN shortly after AT&T's tariff was amended to offer a new feature (switched access) that enabled SDN to be used by resellers. Because of the complexity of this new feature and the fact that demand for it radically exceeded expectations, orders for this feature were initially not provisioned and billed nearly as rapidly or as

accurately as other AT&T services had been -- or as SDN orders were thereafter. These problems affected not only COT, but also the other reseller and non-reseller customers that ordered this new SDN feature during this period.

COT made no claim that the services it received violated any provision of AT&T's tariff, unlawfully discriminated against COT or other resellers, or violated any other provision of the Communications Act. Rather, COT asserted that AT&T's sales representatives had impliedly promised COT that it would receive (at no extra charge) faster, better, and immensely more valuable services than were required by AT&T's tariff and the Communications Act -- or were received by any similarly-situated customers -- and that these claims stated causes of action under state contract and tort law.

In the trial court, these claims were submitted to a jury, over AT&T's objection that COT was claiming a right to the very untariffed preferences and privileges affecting rates that Section 203(c) of the Communications Act and a century of this Court's decisions prohibit. The jury found that AT&T's representatives had made and breached the state-law contract asserted by COT, and the district court awarded COT a "lost profits" judgment of $1.154 million and denied AT&T's counterclaim to recover amounts that the tariff required COT to pay for the services it received, but that COT had refused to pay. Petn. 46a-48a.

A divided panel of the Ninth Circuit affirmed this judgment over Judge Brunetti's dissent. The majority held that the tariff filing requirements apply only to rates and not to terms and conditions affecting rates. Petn. 10a. It also stated that AT&T's tariff had not "covered" two features of the alleged extra-tariff agreement and thus that COT could have

maintained these claims even if the filed tariff requirements were not limited to rates. Petn. 11a. Although the errors in the Ninth Circuit majority's holding can be demonstrated from this Court's prior decisions, AT&T will place the issues in their full context by summarizing the statutory, regulatory, and factual background to this case.

A. Statutory and Regulatory Framework.

AT&T is a "common carrier" (47 U.S.C. § 153(10)) that is subject to the requirements of Title II of the Communications Act of 1934, 47 U.S.C. §§ 201 *et seq.* The provisions of Title II both impose substantive duties on all common carriers and provide procedures and remedies for enforcing these duties.

Section 201 requires carriers to provide communications service to any person "upon reasonable request" under "charges, practices, classifications, and regulations" that are "just and reasonable." 47 U.S.C. §§ 201(a) & (b). Section 202(a) prohibits carriers from making "any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services" in providing "like communications services" or from giving, "directly or indirectly," any "undue or unreasonable preference or advantage" to any person. 47 U.S.C. § 202(a).

Section 203 imposes the filed tariff requirements. It requires that common carriers file "schedules" (commonly referred to as "tariffs") containing all their "charges" for interstate services and all "classifications, practices and regulations affecting such charges," and it prohibits any form of evasion of this requirement. 47 U.S.C. § 203.

The Act also establishes a detailed scheme for enforcing the foregoing requirements. Section 204 provides that carriers

may alter the terms of their tariffs by filing tariff revisions that become effective following a notice period (unless suspended for a maximum period of five months). 47 U.S.C. § 204. After tariff provisions become effective, Section 205 authorizes the Federal Communications Commission ("FCC") to prescribe those changes in the tariffs that are required to conform to the Act. 47 U.S.C. § 205. In addition, private parties are entitled to bring federal law actions for damages by alleging that a tariff provision violates the Act, that a carrier has violated its tariff, or that a carrier has engaged in unjust or unreasonable discrimination or practices in implementing its tariff. 47 U.S.C. §§ 206-208. Complaints for damages can be brought at the FCC or (subject to primary jurisdiction referrals) in a federal district court. 47 U.S.C. §§ 207-208.

Under longstanding FCC regulations, firms that wish to resell long distance services have a right to obtain them under the same rates, terms, and conditions as apply to other customers.[1] The FCC has concluded that the availability of service to resellers will tend to assure that any volume discounts reflect those actual cost savings that carriers enjoy when they offer services in bulk[2] and that orders from resellers will cause carriers to "discontinue non-cost-based volume discounts."[3]

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[1] *See generally Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 F.C.C.2d 261, 283-84 (1976), *aff'd sub nom., American Tel. & Tel. Co.* v. *FCC*, 572 F.2d 17 (2d Cir. 1977); *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services*, 83 F.C.C.2d 167, 173-74 (1980).

[2] *See id.*, 83 F.C.C.2d at 168-69.

[3] *In re MCI Telecom. Corp.*, 81 F.C.C.2d 568, 573 (1980).

Correlatively, the FCC has made it explicit that a carrier's sole duty is to make service generally available to all customers (resale and non-resale) at identical rates, terms, and conditions that satisfy the requirements of the Act. So long as a service is "generally available," there is no requirement that any service be "generally useful" to resellers,[4] that carriers "actively assist resellers,"[5] or that carriers "ensure the success of resellers."[6] Carriers remain free to develop and offer tariffed services that reflect the unique needs of specific classes of customers.

B. AT&T's Software Defined Network Service.

Software Defined Network ("SDN") is a specialized long-distance service that AT&T developed to meet the needs of large enterprises that have offices in multiple locations. ER[7] 2521-22. Among other things, SDN establishes a "virtual private network" that allows employees in different locations to communicate easily and effectively. *See* ER 373, 1428, 2529, 3526, 3545. For example, if SDN were used by a law firm with offices in both Chicago and Washington, a lawyer in the Chicago office could call a lawyer in the Washington office by merely dialing his or her 4-digit extension.

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[4] *AT&T Communications--Revisions to Tariff F.C.C. No. 12*, 6 F.C.C.R. 7039, 7051 (1991), *aff'd sub nom., Competitive Telecom. Ass'n* v. *FCC*, 998 F.2d 1058 (D.C. Cir. 1993).

[5] *Id.*, 6 F.C.C.R. at 7055.

[6] *In re MCI*, 81 F.C.C.2d at 573.

[7] Citations to the Excerpts of Record on appeal are abbreviated "ER __."

Establishing an SDN network for an individual customer is a highly complex and expensive process.[8] ER 699-706. Once an initial SDN network is established, the customer can place orders to add new locations or drop existing locations. ER 389-90. Thus, if the law firm mentioned in the previous example were to open a new office in New York, then AT&T could add that location at the firm's request. This would permit lawyers in Washington, Chicago, and New York to communicate across offices simply by dialing a four-digit extension.

In addition to establishing rates, AT&T's SDN tariff defines AT&T's duties and responsibilities in provisioning (*i.e.*, filling) orders for services as well as in billing them. The tariff provides that "when an order for service is placed," AT&T will "establish and confirm" a due date for provisioning that order. App. 19a (§ 2.5.10). The tariff states that AT&T will "make every reasonable effort" to provision service by the due date, but states that "in some cases a delay in the installation may be unavoidable." App. 20a (§ 2.5.10.B). The tariff further provides that "if an order is delayed beyond its due date for more than 45 cumulated calendar days and such delay is not requested or caused by the Customer, the Customer may cancel the order without penalty or payment of nonrecurring charges." *Id.*

As to billing, AT&T's tariff does not require that bills be issued at any particular time after service is rendered. With

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[8] The SDN tariff imposes a substantial one-time installation charge (that is waived under the tariff only if the customer makes a multi-year commitment and agrees to pay the unamortized portion of the charges in the event of early termination). *See* App. 26a (§ 6.4.1).

one exception that is not here relevant,[9] the tariff also provides that the customer is responsible for payment of all the tariffed charges on its network when the bill is issued and that AT&T "will not allocate usage or . . . charges" among the locations on the customer's network and "is not responsible for the way that the Customer may allocate usage or charges." App. 24a (§ 6.2.4).

AT&T has implemented these tariff billing provisions by giving SDN customers the option to elect to receive bills in one of two different formats: "network billing"[10] or "multilocation billing."[11] ER 370, 414, 616-21, 1430-31. Neither of these options is described in the tariff, for no separate charge is imposed for either option. Further, under the tariff, the choice between the options cannot either affect the customer's responsibility to pay the tariffed charges or constitute AT&T's allocation of charges or usage among

---

[9] The exception is called "Location Account Billing Option" ("LABO"), and it applies only to SDN services obtained by a corporation on behalf of independently owned franchisees. Under LABO, AT&T sends bills directly to each network location at the applicable discounted tariff rates, and each location account is solely responsible for payment of its charges. App. 24a (§ 6.2.4). Because LABO alters the responsibility for payment of the bills, AT&T's tariff provides that under LABO -- unlike the network billing and multilocation billing described below -- AT&T is responsible for allocation of charges. *Id.*

[10] In network billing, AT&T prepares a single bill that applies the tariffed rate (with applicable discounts) to all the usage originating at all the customer's locations. The customer can then use the information to allocate charges among locations as it sees fit. ER 1430-31.

[11] In multilocation billing, AT&T prepares bills that reflect each location's usage at the discounted tariffed rate plus a markup that reflects some or all of the applicable volume discount, as designated by the customer. ER 370, 414, 616-21.

locations. ER 369-70; App. 24a (§ 6.2.4). Rather, they are different methods of apprising the customer of the total charges it owes and of providing information to enable the customer to allocate charges among locations. ER 1430-31.

AT&T's SDN tariff also contains a general limitation on AT&T's liability for service-related claims. For "nonwillful" violations, AT&T's liability is limited to a proportionate share of the applicable service charges for the affected period, and this amount is in addition to any credits for service outages. App. 10a (§ 2.3.1.A). For violations that constitute "willful misconduct," there is no limitation on AT&T's liability. *Id.*

C. The Development Of Switched Access SDN And The Emergence Of Switchless Resellers.

Prior to late 1989, SDN customer locations had to be connected to AT&T's network over special "dedicated access" lines. ER 2521-22. These are essentially direct "pipes" from a location's telephone system to AT&T's long-distance network, so long-distance calls carried over these lines are not sorted and routed by the switches of the local exchange carrier that serves that area. ER 2539-40.

In 1989, AT&T developed the capability to allow customers to use ordinary ("switched access") telephone lines to hook up locations to their SDN networks, and AT&T revised its tariff to offer this feature. ER 385, 1181-85, 2522. This change was designed to address the needs of corporations that had some individual locations which did not generate enough long-distance calling to make dedicated access economic. *See* ER 2522.

Provisioning of switched access connections to SDN networks proved to be far more complicated than the provisioning of dedicated access connections. Filling each switched access order required making coordinated physical changes not just in AT&T's network, but also in the separate switches of the local exchange carrier that served the location in question (*e.g.*, Bell Atlantic in Washington). *See* ER 794-804. In 1989, there were no established procedures to perform these steps. ER 874-76, 2692-93, 2707-09, 2720-21. Because SDN had been designed for use by corporate customers that have stable sets of locations, AT&T had expected that there would be relatively few orders for switched access connections to SDN networks. ER 2695-96.

But the 1989 tariff revisions had an unanticipated effect. ER 2695-96, 2740-41. They led to SDN orders by a new class of long distance service resellers that had not previously existed -- "switchless" resellers who own or operate no facilities of their own. ER 805-06, 1181-82. By contrast, the resellers who had existed prior to 1989 were all firms (*e.g.*, predecessors to today's MCI, Sprint, and WorldComm) who owned some long distance switches or other facilities. ER 1180-81. These "switch-based" resellers provided services by obtaining the local telephone facilities required to hook up their customers to their own switches and by subscribing to AT&T services solely to fill in gaps in their network or to terminate calls to areas they did not serve. *See* ER 1180-82.

Switchless resellers operate differently. They are pure arbitrageurs who own no facilities and make no arrangements for any aspect of service. *See id.* Rather, they subscribe to services like SDN, sign up customers, and then place orders telling AT&T to treat their customers as if they were new locations on a corporate SDN network. *See* ER 363-64, 2496. In this regard, the switchless resellers were not attracted to

SDN by the features designed for corporate customers (like 4-digit calling). ER 2525. Rather, they were attracted because SDN rates for other calls using switched access were then lower than those for other discounted services and because they believed that they could profitably serve smaller customers for whom these SDN rates (with the resellers' mark-up) would be attractive. ER 386-87, 1202, 1211.

The net result was that, although AT&T had expected only a relatively small number of switched access SDN orders, there was a tremendous volume of these orders that grew explosively throughout 1990. ER 2695-96, 2740-41. There had been no switchless or other resellers of SDN prior to the 1989 tariff change. But by October 1990, there were approximately 100 switchless SDN resellers. ER 2347. Further, after an extraordinary and unprecedented volume of orders for switched access SDN connections was placed in the fourth quarter of 1989 -- *i.e.*, 692 orders (ER 2785-86) -- that number grew exponentially in succeeding quarters until there were over 13,000 switched access orders placed in the third quarter of 1990. ER 2696, 2785-87.

AT&T and the local exchange carriers did not have the processes in place to provision these volumes of switched access orders as rapidly as dedicated access orders were then being filled or as quickly as AT&T personnel had previously predicted switched access orders would be filled. ER 874-76, 2692-94, 2707-09, 2720-21. Further, the provisioning process was slowed by the fact that many of the new switchless resellers had little or no experience in telecommunications and did not collect the correct information from their customers. As a result, single orders for individual locations often had to be run through the process multiple times, clogging the overtaxed systems further. ER 1288, 1714, 2530-31, 2695.

Related billing problems also emerged.[12] The provisioning and billing problems affected all SDN customers who placed switched access orders. ER 917, 2616, 2625. In addition, the switchless resellers initially dealt with the members of AT&T's regional sales force that served large corporate customers and who lacked both experience in the different needs of resellers and the capacity to receive and process large volumes of orders to "add" or "delete" locations from SDN networks. ER 792-94, 2504.

After these problems emerged, AT&T took extensive steps to improve its provisioning and billing of switched access SDN operations. For example, AT&T centralized the function of processing SDN orders from resellers. It transferred those tasks from the regional AT&T sales offices which had no experience with the special needs of resellers to the AT&T division which had successfully handled orders from other resellers of AT&T services for a decade. ER 2782, 2495, 2692-97. This division developed numerous computer systems for SDN orders, created new provisioning systems, recruited key personnel from other AT&T business groups, established data protocols with local exchange carriers, and established time goals for each step of the process. ER 2310-16, 2771-83. To address the problems created by resellers' submission of incorrect information, this division established revised order forms, adopted special instructions for resellers, and trained staff to assist the resellers. ER 1988, 2313, 2696, 2699-2701, 2777-84. By late 1991 and early 1992, AT&T had cleared out

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[12] The principal SDN billing problem was "suppressed billing," which occurs when a location is on the SDN network but there is not yet a mechanism in place to match its phone usage to a billing record. ER 2829-30. The billing system then has nowhere to register the calls and lumps them in an "unbilled" toll group until a proper mechanism is set up, at which time the customer is billed for its prior calls. *Id.*

its backlog of orders and was provisioning the huge volumes of new switched access as rapidly as it had previously predicted it could. *See* ER 1297-1300, 2822. It also had eliminated the principal causes of the billing delays and problems. *See* ER 2342, 2511.

During the first half of 1990, AT&T also considered a number of tariff revisions and operational changes to address the problems that switchless SDN resellers had raised. *See* ER 1315-40. In the end, AT&T rejected the extreme proposals that it should "kill arbitrage" by filing tariff revisions (as MCI had done for its competing services) establishing higher rates for calls originating at locations that were not affiliated with the customers of the service. ER 549-50. But AT&T adopted measures designed to protect itself against those switchless resellers who were illicitly passing themselves off as part of AT&T and were causing losses to AT&T and problems for their own customers by not paying SDN bills. *See* ER 3739-41. Some AT&T personnel had referred to such resellers in derogatory terms in internal memoranda. *See* ER 3405.

D. Central Office Telephone.

Central Office Telephone was part of the first wave of SDN resellers who placed orders for SDN in the fall of 1989. Its president, Gordon J. Rood, had formerly worked for the Bell System and had begun COT's operations by reselling an MCI long-distance service. ER 357-64, 548. But after he heard about SDN, Mr. Rood contacted AT&T about reselling AT&T's service as well. ER 365-66. In October of 1989, Mr. Rood met with an AT&T sales representative -- LaDonna Kisor -- in AT&T's Portland, Oregon office. ER 366-75. She gave Mr. Rood literature on SDN and described the service. ER 366-75, 381-85. She also predicted that AT&T could establish an initial SDN network for COT in four to five months, and that

AT&T could thereafter add new locations within 30 days after receiving an order. ER 389-90, 418, 1819-20.

COT initially subscribed to a tariffed SDN plan under which the up-front installation charges would be waived (*see* p. 7 n.8) and COT would receive a 17 to 20% discount off basic SDN rates in exchange for a four-year commitment to purchase two million minutes of SDN service annually. *See* ER 370. In a letter dated October 25, 1989, AT&T acknowledged COT's order, stating that COT would obtain SDN "pursuant to the rates, terms and conditions in AT&T's [FCC Tariff No. 1]," and that the provisions of this tariff, "including limitations on AT&T's liabilities, shall govern your and AT&T's obligations and liabilities with respect to the service and options you have selected." ER 3721; *see* ER 416, 576. Mr. Rood accepted these terms in writing. ER 3722.

In February of 1990, after the provisioning problems with SDN became apparent, Ms. Kisor told COT that it would take 45 to 90 days to add new locations after the initial SDN network was established. ER 418-21, 1829-30. Ms. Kisor suggested "parking" COT's affected customers on a different AT&T tariffed service (Multi Location Calling Plan) until they could be placed on SDN. *Id.* That service's usage would then be credited toward COT's SDN usage (as it eventually was). ER 420-21, 1830-31. COT ordered this arrangement in March 1990. ER 3737-38; *see* ER 417, 590.

In April 1990, Ms. Kisor informed COT that its initial SDN network was up and running. ER 431-32. COT thereupon elected to increase to a larger SDN volume commitment (15 million minutes annually) in order to qualify for an even larger discount (up to 24%). ER 431-32, 594-95. In placing this order, COT signed a form expressly stating that the SDN service "WILL BE GOVERNED BY THE RATES

AND TERMS AND CONDITIONS IN THE APPROPRIATE AT&T TARIFFS." ER 4037; *see* ER 594, 596-99.

COT began to obtain SDN services in April 1990, but, particularly during the first nine months, COT experienced the provisioning delays and suppressed billing problems that affected all SDN customers. During the first six months that it received SDN service, COT also experienced problems with the multilocation billing format that COT had chosen. ER 468-69, 1893. Although COT had instructed AT&T to prepare bills that included half of COT's volume discount in the data for each location, AT&T personnel initially applied the entire discount. *Id.*[13] AT&T personnel made extensive efforts to offset the error and eventually prepared corrected statements. COT then chose not to attempt to collect the full amounts from its customers for the prior periods. ER 483-84, 2019-20. Although the tariff made it explicit that COT remained fully responsible for the tariffed charges, COT refused to pay nearly $200,000 that AT&T had billed and that COT had been obliged to pay under the SDN tariff for the period in which COT used multilocation billing. ER 2925-26, 491. In October 1990, COT switched to network billing, pursuant to which AT&T sent COT a single monthly statement for all SDN usage, and COT then sent its own individual bills with mark-ups to its customers. ER 1946, 2607, 4593. COT had, in fact, always planned to switch to network billing eventually. ER 2542.

COT used more than 8,500,000 minutes of SDN during the first year to which its usage commitment applied (April 1991 to April 1992), and COT would have exceeded its 15 million minute commitment during this period if it had not

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[13] It was determined that the error occurred because Ms. Kisor checked the wrong box (LABO) when she entered COT's provisioning data into AT&T's computers. ER 1761-62, 2534-35; *see* p. 8 n.9, *supra*.

switched many customers to a competing Sprint service, which COT also resold. ER 3029; *see* ER 4323.

In September 1992, COT notified AT&T that it was terminating its SDN service effective September 30, 1992. There were then 18 months remaining on COT's four-year commitment. ER 4621-22. This decision subjected COT, among other things, to liability for part of the charges for installing COT's initial SDN network which had been waived in exchange for COT's term and volume commitments. ER 4623. COT did not pay these tariffed charges.

By the time COT terminated SDN, AT&T was provisioning new orders within 45 to 60 days; COT had no monthly billing problems with network billing, and the major causes of unbilled toll had been eliminated. ER 2020, 2511, 2820-23. In the interim, however, AT&T's basic SDN rate schedules, from which COT's discounted rates were computed, had been increased by 2% in April of 1991, by another 2% in September of 1991, and by 7% in June of 1992. ER 533. COT stated in its amended complaint that it terminated SDN because of these price increases. J.A. 28; ER 30.

E. This Lawsuit.

COT sued AT&T on November 27, 1991, in the United States District Court for the District of Oregon, and AT&T later filed a counterclaim to recover the $200,000 in unpaid tariffed charges from 1990 and the termination charges that COT did not pay in 1992. ER 55-58.

COT's claims were not brought under Section 206 of the Communications Act, and its complaint did not claim that AT&T had violated its tariff (a violation of Section 203) or any

other provision of the Communications Act.[14] Rather, in addition to other federal and state claims that were dismissed, COT raised state law claims for (1) breach of contract and breach of an implied covenant of good faith and fair dealing and (2) tortious interference with COT's contracts with its customers. J.A. 29-34; *see* ER 2471, 2476-77. As the Ninth Circuit stated, both the contract and the tort claims rested on the same fundamental premises: that the agreement between COT and AT&T was not limited by the terms of AT&T's tariff, but "included all the understandings that COT's president had from reading service brochures and from talking with AT&T representatives" and that AT&T had breached these contractual duties. Petn. 6a; *see* J.A. 70-71.

In particular, COT claimed that statements of AT&T personnel constituted a binding guarantee that AT&T would provide an array of services that were better and more valuable than specified in the tariff. It claimed that AT&T guaranteed to provision SDN and other orders within short time frames, to bill service expeditiously, to allocate charges among COT's customers, and to excuse COT from the tariff's requirements that deposits be posted. J.A. 23-29. Further, although the FCC has repeatedly stated there is no such duty under federal law (*see* pp. 5-6, *supra*), COT also broadly argued that AT&T had impliedly agreed to provide SDN services that were "functional" for COT's purposes, and that the "implied" state law duty "of good faith and fair dealing" prohibited any actions by AT&T that undermined the contract's "purpose" of assuring COT could profitably resell SDN. J.A. 68-71. COT claimed that AT&T had breached this last alleged duty by lawfully

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[14] Following the close of discovery, COT sought leave to amend its complaint to add a claim for unlawful discrimination under Section 202(a), but this motion was denied by the magistrate judge as untimely. J.A. 6-7, ER 158-59. COT did not appeal this ruling to the Ninth Circuit.

raising basic SDN rates and taking other actions that were required or permitted by the Communications Act.[15] Finally, COT claimed that AT&T's breaches of these agreements excused COT from paying the $200,000 in usage charges in 1990 and allowed it to terminate service in 1992 without paying the termination charges covering, among other things, the unamortized portion of the costs of installing COT's initial SDN network. *See* ER 491, 3195-96.

AT&T asserted at each pertinent stage of the district court proceedings that COT's state law contract and tort claims were preempted by the filed tariff requirements of § 203 of the Act. ER 87-100, 2373-89, 2448-57, 4706-17. The magistrate judge rejected AT&T's preemption defense at each stage. The magistrate judge instructed the jury that to "determin[e] the terms and conditions of the parties' agreements, you're to consider the three subscription agreements" of October 1989, March 1990, and April 1990. J.A. 70; ER 3331. In addition, he instructed that the jury could "also consider any oral statements or written documents which were made or furnished before the parties signed the various agreements if you find that the parties intended that those statements or written materials form part of their agreements" and that it could consider whether AT&T violated its implied duty of good faith by taking any steps that frustrated the contract's purpose. J.A. 70, 71; ER 3332-33. He also instructed the jury that it had to find that AT&T's breaches of these agreements were "willful." J.A. 70; ER 3331.

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[15] Ironically, COT stated that the "most significant" instance of misconduct in violation of the implied agreement was AT&T's centralization of SDN provisioning, which assured that COT received the same level of support as other resellers, and which ultimately solved the provisioning problems, but which allegedly meant COT received less support than Ms. Kisor had provided. *See* ER 3190.

The jury found for COT on its state law claims, rejected AT&T's counterclaim for unpaid tariff charges, and awarded $13,000,000 of "lost profits." App. 48a; J.A. 69; ER 4681-82. The magistrate judge subsequently reduced the judgment for COT to $1.154 million, which represented the lost profits COT had claimed during the period before it canceled SDN on September 30, 1992. Petn. 47a; ER 4781-82, 4790.[16]

Over Judge Brunetti's dissent, the Ninth Circuit affirmed this judgment and remanded for a trial on whether COT's success on its tortious interference claim also entitled it to punitive damages under Oregon state law. Petn. 1a-30a. On July 18, 1997, the Court of Appeals denied AT&T's petition for re-hearing and suggestion for re-hearing en banc. Petn. 49a.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. COT's $1.154 million judgment epitomizes the preferences and discrimination among similarly situated customers that the Communications Act prohibits. In particular, this judgment did not rest on claims that AT&T had violated its tariff or that any provision of its tariff violated Section 201(b)'s or Section 202(a)'s prohibitions against unreasonable rates, practices, or discrimination. Nor did COT claim that AT&T had engaged in unreasonable practices or discrimination against COT or other resellers and in favor of corporate customers in its actual provision of service. Notably, while other SDN resellers have litigated those claims, they

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[16] COT appealed the district court's reduction of the judgment, but the Ninth Circuit affirmed this decision (Petn. 14a-18a), and this Court denied COT's petition for certiorari presenting this issue.

have, to date, been rejected by the juries and courts who have decided them.[17]

COT's judgment was entered solely under state contract and tort law. COT was permitted to argue, and the jury was permitted to find, that COT had been impliedly promised faster, costlier, and more valuable services than was required by AT&T's tariff or by the Communications Act. COT was thus awarded damages (and excused from paying tariffed charges for the services it received) because COT did not receive better service than the hundreds of resellers and other customers who subscribed to the same AT&T SDN service during the period from 1990 to 1992. For example, COT claimed that AT&T's representative impliedly made untariffed guarantees that COT's orders would be provisioned within 30-90 days, that no bills for any services would be delayed, that AT&T would allocate charges and usage among COT customers, and that SDN would be "functional" for COT and would enable it "profitably" to resell SDN.

However, the decisions of this Court establish that no such promises could have lawfully been made and that COT's judgment constitutes an illegal "rebate" and "preference." *See, e.g., Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 439-41 (1907); *Keogh* v. *Chicago & N. W. Ry.*, 240 U.S. 156, 163 (1922). For the same reason, the Ninth Circuit's decision affirming this judgment is contrary to the terms of the Act and is foreclosed by a century of decisions of this Court.

2. The fundamental error of the Ninth Circuit panel majority is its holding that the statutory filed tariff requirements apply only to "rates" and "ratesetting." Section 203(a) of the

[17] *US WATS, Inc.* v. *AT&T*, No. 93-CV-1038 (E.D. Pa. Dec. 15, 1995); *Teledesign* v. *AT&T*, No. H-92-1919 (S.D. Tex. Apr. 21, 1994).

Communications Act requires all carriers to file tariffs that include not only all their rates, but also "the classifications, practices, and regulations affecting such charges." Section 203(c) further expressly prohibits carriers from extending to customers any "privileges" or employing any "classifications, regulations, or practices affecting . . . charges" that are not "specified" in the filed tariff.

Moreover, this Court has squarely held that the filed tariff doctrine prohibits untariffed guarantees of better and "expedited service" such as COT alleged. In particular, one of COT's principal claims in this case was that it had been promised the faster provisioning of services than the tariff required: that is, the installation of orders within 30-90 days. But this Court has expressly held, on at least three occasions, that untariffed guarantees to provide faster or "expedited" service (*e.g.*, placing shipments on the "next train") affect the value and cost of service and constitute the "preferences" and "privileges" and "practices affecting . . . charges" that the tariffing requirements prohibit. *Chicago & Alton R.R.* v. *Kirby*, 225 U.S. 155 (1912); *Atchison, T. & S.F. Ry.* v. *Robinson*, 233 U.S. 173 (1914); *Davis* v. *Cornwell*, 264 U.S. 560 (1924). Further, there were myriad other respects in which COT was permitted to claim, and the jury to find, that COT was entitled to services and commitments that were better, costlier, and more valuable than those specified in AT&T's tariff and received by other similarly-situated customers.

3. There is also no merit to the Ninth Circuit's conclusion that two elements of the purported extra-tariff "side agreement" -- provisioning and multilocation billing -- were not "covered" in the tariff and thus could be enforced even if the tariff requirements were not limited to rates. This "alternative" holding would not support COT's judgment even if it were valid. However, it is erroneous for two separate reasons.

First, contrary to the Ninth Circuit's holding, the provisions of AT&T's tariff expressly address both provisioning and billing. The tariff itself forecloses any claim that AT&T had agreed to fill orders within any particular number of days or to engage in the allocations of charges and usage among a reseller's customers that COT here sought.

Second, even if AT&T's tariff had been silent on these subjects, the law is clear that "gaps" cannot be filled by allowing juries to find that individual customers have been guaranteed expedited and enhanced services under state contract or tort law. Indeed, the tariff was silent on these subjects in both *Kirby* and *Davis*, and the Court held that the carriers' only obligations were to provide service on the terms and conditions that could be "implied in the tariff" as a matter of federal law under principles of tariff interpretation: that is, to use due diligence. *Davis*, 264 U.S. at 561; *accord Kirby*, 225 U.S. at 164-65. The Court held in each case that to allow guarantees of expedited and enhanced service to be imposed under state law would constitute the very privileges affecting rates, preferences, and discrimination that tariff filing requirements are designed to prevent.

ARGUMENT

I. THE JUDGMENT IN THIS CASE AWARDS COT A PRIVILEGE AND A PREFERENCE AND THUS VIOLATES THE STATUTORY FILED TARIFF REQUIREMENTS.

Section 203 of the Communications Act is one of a number of statutory filed tariff requirements that was "copied"

from the provisions of the original Interstate Commerce Act.[18] Section 203(a) requires every common carrier to file tariffs containing all their rates, and all "classifications, practices, and regulations affecting such charges." 47 U.S.C. § 203(a). Sections 203(c)(1) and (2) prohibit a carrier from collecting any "less or different compensation" than "specified" in the tariff, and from "refund[ing]" "any portion of the charges so specified" through any "device." 47 U.S.C. § 203(c)(1) & (2). Section 203(c)(3) forbids any carrier from "extend[ing] to any person any privileges . . . in such communication," or employing "any classifications, regulations, or practices affecting such charges," that are not "specified" in the tariff. 47 U.S.C. § 203(c)(3).

As this Court has recognized, "[t]he tariff-filing requirement is . . . the heart" of the regulatory regime established by the Communications Act, and it is to be construed in the same way as the provisions of the Interstate Commerce Act upon which Section 203 of the Communications Act is based. *MCI Telecom. Corp.* v. *American Tel. & Tel. Co.*, 512 U.S. 218, 229-31 (1994). Indeed, the Court has stated that the statutory tariff filing provisions, and the judicial decisions construing them, establish a "filed rate" or "filed tariff" doctrine that "has been extended across the spectrum of regulated utilities." *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577 (1981).

The "paramount purpose" of the filed tariff requirement is to assure that all similarly-situated customers pay the same tariffed rates, and receive the tariffed services under the same terms and conditions that affect those rates. *Keogh*, 260 U.S. at 163; *see Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497

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[18] *See* S. Rep. No. 781, 73d Cong., 2d Sess. 2, 4 (1934) & H.R. Rep. No. 1850, 73d Cong., 2d Sess. 4, 5 (1934).

U.S. 116, 126-31 (1990); *MCI Telecom. Corp.*, 512 U.S. at 230; *Abilene Cotton Oil*, 204 U.S. at 439-40. The doctrine thereby enforces the separate statutory prohibitions against discrimination and rates and practices that are unjust or unreasonable.[19] *Compare* 47 U.S.C. §§ 201(b) & 202(a) *with MCI Telecom. Corp.*, 512 U.S. at 230 ("rate filing was Congress's chosen means of preventing unreasonableness and discrimination in charges").[20] As the Court has held, the filed tariff doctrine prohibits any form of rate discount or preference not provided by the tariff. *Maislin*, 497 U.S. at 127; *MCI Telecom. Corp.*, 512 U.S. at 230.

The Court has made it clear that the strict requirements of the filed tariff doctrine apply even when a customer might reasonably believe that it would receive certain promised benefits not reflected in the tariff, and in these cases the doctrine may appear "harsh." *Maislin*, 497 U.S. at 128. In this case, however, there is nothing harsh about a holding that COT's rights and duties are defined by the applicable AT&T tariff, and could not be altered by the representations that AT&T's employees are claimed to have made orally or impliedly. In particular, *after* these representations had purportedly been made, AT&T made it as clear as language can make it that COT's rights and duties would be governed by

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[19] The doctrine also preserves the authority of the regulatory agency to maintain a uniform national policy, by assuring that all questions involving rates and associated services can be brought before the responsible agency for its review and oversight. *See Robinson* v. *Baltimore & O. R.R.*, 222 U.S. 506, 509 (1912); *Abilene Cotton Oil*, 204 U.S. at 440-41.

[20] Indeed, Congress has prospectively authorized exceptions to the tariff filing requirements after February 8, 1996, only where the *FCC* determines, among other things, that the tariff filings are not required to enforce these requirements for particular carriers. Telecommunications Act of 1996, Pub. L. 104-104, § 401, 110 Stat. 128 (1996) (codified at 47 U.S.C. § 160).

AT&T's tariff, and COT's President (who had previously worked for the Bell System) then agreed to these terms in writing on *three* different occasions. *See* pp. 14-15, *supra*. In this regard, the filed tariff doctrine operates as a strict rule against use of "parol" evidence and alleged side agreements, thus preventing easily manufactured claims against common carriers, which are *obliged* to provide service in accordance with their tariffs and whose sales agents have no freedom of contract (and no conceivable reason to make legally binding guarantees of an expedited service for which there can be no extra charge). *See Robinson*, 233 U.S. at 180-81.

Finally, this Court has long held that the statutorily-forbidden preferences or privileges include not only those extended voluntarily by carriers, but also court-awarded damages for the carrier's violation of express or implied promises to confer such an advantage. "[T]he rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier." *Keogh*, 260 U.S. at 163 (quoted in *Maislin*, 497 U.S. at 126). Otherwise, customers who are awarded damages under state law "would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced." *Abilene Cotton Oil*, 204 U.S. at 441 (preempting state tort actions for charging unreasonable rates); *see also Boston & M. R.R.* v. *Hooker*, 233 U.S. 97, 109-10 (1914) (preempting state law contract claims); *Adams Express Co.* v. *Croninger*, 226 U.S. 491, 505-06 (1913) (same). Indeed, the Court has held that the filed tariff requirements even preclude certain damages awards under federal antitrust laws, for "[i]f a shipper could recover under § 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors." *Keogh*, 260 U.S. at 163.

Under these settled principles, COT's judgment violates Section 203(c) of the Act. It awards COT damages (and excuses its failure to pay tariffed charges) on the ground that AT&T breached untariffed "side deals" that purportedly guaranteed COT services that were faster, better, and immensely more valuable than required by AT&T's tariff. COT claimed it was not only guaranteed expedited service that others did not receive, but it was promised that SDN would be "functional" for COT and that it would enable COT to profit from resale -- guarantees that no resale or other customer receives under the tariff. *See* J.A. 68, 69; pp. 17-18, *supra*.

II. THE FILED TARIFF REQUIREMENT IS NOT LIMITED TO RATES, BUT APPLIES TO ALL TERMS AND CONDITIONS THAT AFFECT RATES.

The Ninth Circuit did not deny any of the foregoing principles. However, it held that the filed tariff requirements and this Court's holdings do not apply in this case because they concern only "rates or rate-setting" and not "provisioning of services and billing" or other matters that affect the value or cost of service. Petn. 10a. The Ninth Circuit cited no decision of this Court in support of this ruling, relying instead on statements from the lower courts about some of the purposes of filed tariff requirements. *Id.* In fact, the Ninth Circuit's ruling is contrary to the plain language of the statute, longstanding precedent of this Court, the uniform decisions of other courts of appeals, and common sense.

First, by the very terms of the Communications Act, the tariff-filing requirement applies not only to rates, but also to "the classifications, practices, and regulations affecting" rates. 47 U.S.C. § 203(a). The Act further expressly prohibits carriers from extending to any customer any "privileges" or employing

any "classifications, regulations, or practices affecting" charges that are not "specified" in the tariff. 47 U.S.C. § 203(c)(3). In this case, COT claimed that AT&T acted unlawfully both in applying the rate-affecting provisions of its tariff to COT (*e.g.*, deposit requirements) and, more fundamentally, in failing to extend COT a host of "privileges" and "classifications, regulations, or practices affecting" rates that were not contained in AT&T's tariff.

The plain language of Section 203 prohibited this conduct every bit as much as it prohibited AT&T from deviating from the tariffed rates. 47 U.S.C. § 203(c). This Court has long held this prohibition is not limited to "rates," but "applies equally to . . . any of the *services* within the purview of the Act." *Southern Ry.* v. *Prescott*, 240 U.S. 632, 638 (1916) (emphasis added); *accord Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 966 (1986) ("the filed rate doctrine is not limited to 'rates' *per se*").

Indeed, this Court has held that these requirements preclude the very claims for expedited provisioning and billing that COT here asserted under state contract and tort law. For example, in *Chicago & Alton R.R.* v. *Kirby*, 225 U.S. 155 (1912), a railroad agent had told a shipper that his racehorses would be sent from Springfield, Illinois, to New York City on a particular express train. When the railroad instead shipped the horses by "a later and much slower train" (*id.* at 163), the shipper sued for breach of contract. A jury awarded damages, and the state supreme court affirmed. This Court reversed, holding that even if the rate the carrier should charge were not altered, such a contract for expedited service could not be enforced because it would be "an undue advantage in that it is not one open to all others in the same situation." *Id.* at 165.

This Court reasoned that the carrier's tariffs "did not provide for an expedited service, nor for transportation by any particular train." *Id.* at 163. The "guarantee" to expedite the shipment, by contrast, caused the carrier to come "under a liability different and more burdensome than would exist to a shipper who made no such special contract," and the agreement affects rates in that it "affects the value of the service to the shipper and its costs to the carrier." *Id.* at 165. Such a "guarantee," the Court explained, was illegal because it was not "published in the tariffs" and because it provided for an "advantage" and "preference" not open to all others in the same situation. *Id.*

Similarly, in *Davis* v. *Cornwell*, 264 U.S. 560 (1924), the Court (per Justice Brandeis) reversed a judgment that enforced another agreement to provide expedited service (there, the delivery of railroad cars on a specified day) on the ground that such guarantees are valuable and the tariff did not address the subject. The Court explained that "[t]he assumption by the carrier" of any such additional untariffed obligations "was necessarily a preference." *Id.* at 562; *accord Robinson*, 233 U.S. 173. Such a "preference" would permit the customer to sue and recover lost profits for a breach, when similarly situated customers could not get that same recovery.

Kirby, *Davis*, and their progeny have been uniformly followed by each of the courts of appeals to address those same issues. Indeed, the Seventh Circuit stated more than 50 years ago that, "[i]n our judgment, this question has been so definitely settled by the Supreme Court that further decisions by us would be superfluous." *Consumers' Mut. Oil* v. *Schaff*, 59 F.2d 730, 731 (7th Cir. 1932); *accord Competitive Telecom. Ass'n* v. *FCC*, 998 F.2d 1058, 1062 (D.C. Cir. 1993); *Paulson* v. *Greyhound Lines, Inc.*, 804 F.2d 506, 507-08 & n.5 (8th Cir. 1986); *Transcontinental Bus. Sys., Inc.* v. *CAB*, 383 F.2d 466, 481-82 (5th Cir. 1967).

The Ninth Circuit's distinction between rates and other terms and conditions of services not only is foreclosed by the Act and the prior decisions of this Court and other courts of appeals, but also defies common sense. If one customer is guaranteed expedited and more valuable service than other customers, it effectively pays a lower rate than those other customers, for it receives better service for the same price. An interpretation limiting the filed tariff doctrine to rates would therefore allow ready evasion of the central mechanism for enforcing the policies of the Act. *See* Petn. 21a (Brunetti, J., dissenting).

Finally, the Ninth Circuit majority's attempt to distinguish *Kirby*, *Davis*, and *Robinson* is unavailing. It states, correctly, that "the agreements cited in these cases were for special expedited shipping services for which the customer would have been expected to pay a higher rate." Petn. 10a n.9. But that is true here as well. AT&T would not, and could not, have guaranteed such expedited service to any customer unless it received a higher rate, for AT&T would be providing more valuable and costlier service, and would come under a more burdensome liability.

In this regard, it is irrelevant that "COT [now] *contends* that AT&T provided special services to others, but denied them to COT." Petn. 10a n.9 (emphasis added). There is no record evidence of such differential treatment, much less of a guarantee to corporate customers. Further, even if there were such evidence, this "content[ion]" would have no relevance to the question of what services AT&T guaranteed it would provide COT under the tariff. Instead, it could only have been evidence that AT&T had discriminated against COT and other

resellers by provisioning only the orders of corporate customers more rapidly than the tariff had guaranteed. But COT made no Section 202 claim in its complaint; it was denied leave to amend its complaint on the eve of trial to add such a claim, and COT did not appeal that ruling. *See* p. 17 n.14, *supra*; J.A. 19-36, 37, ER 158-59. Further, when these claims have been litigated by other SDN resellers from this period, they have been rejected by the courts and juries that decided them. *See* p. 20 n.17, *supra*. There is thus no basis to uphold COT's judgment by relying on belated and unproven "contentions" of discrimination.

This is particularly so because COT not only claimed a right to the expedited service that COT "contended" had been received by corporate SDN customers. It also claimed a nontariffed entitlement to other service terms and conditions that are immensely more valuable than those received by corporate customers and the SDN resellers with whom COT competed: that is, services that are "functional" for COT and would assure that COT could profitably resell SDN. *See* p. 18, *supra*. These are guarantees no customer receives, and providing them only to COT would have constituted unlawful discrimination against SDN resellers and other customers.

Finally, although the filed tariff doctrine clearly bars claims for privileges that affect rates as well as claims for preferential rates, this does not mean that COT did not have available to it a full and adequate damages remedy for its service-related complaints. First, of course, if a customer believes a carrier has failed to provide service in accord with the tariff, the customer may sue for damages for violation of Section 203. *See, e.g.*, *Wallace* v. *AT&T Communications of the Southern States, Inc.*, 6 F.C.C.R. 1618, 1618 (1991). Second, even if the carrier is in compliance with the tariff, the customer may seek damages by claiming that particular tariff

provisions represent unjust or unreasonable practices or discrimination. *See, e.g.*, *AT&T Corp.* v. *FCC*, 86 F.3d 242, 243 (D.C. Cir. 1996). Finally, if a customer believes that the carrier is applying tariff provisions in an unequal fashion among similarly-situated customers, it may challenge this conduct as unjust and unreasonable discrimination or an unreasonable practice. *See, e.g.*, *People's Network, Inc.* v. *American Tel. & Tel. Co.*, 1997 FCC LEXIS 1928, *1 (Common Carrier Bureau, Apr. 10, 1997). Thus, while the filed tariff doctrine is "undeniably strict" in the domain where it operates, *Louisville & N. R.R.* v. *Maxwell*, 237 U.S. 94, 97 (1915), there are federal remedies for any deficient or discriminatory service that avoids the preferences under state law that COT here obtained.

III. ALTHOUGH AT&T'S TARIFF "COVERED" BOTH BILLING AND PROVISIONING, COT'S CLAIMS WOULD BE FORECLOSED BY § 203 AND THIS COURT'S DECISIONS EVEN IF THE TARIFF HAD BEEN SILENT ON THESE SUBJECTS.

The Ninth Circuit also stated that the "filed-rate doctrine could not apply to any of COT's claims with regard to [multilocation] billing or provisioning" even if the doctrine were not limited to rates and "could apply to other aspects of the SDN service." Petn. 11a. It concluded that these two aspects of COT's claimed agreement are not "covered by the tariff" and are thus outside the statutory filed tariff requirements. *Id.* In Judge Brunetti's words, the majority found that there were gaps in AT&T's tariff and "that [state] common-law applies to fill in gaps left in tariffs." Petn. 26a.

Even if this "alternative" holding could support the jury's verdict,[21] it is erroneous for two separate reasons.

First, the Ninth Circuit was simply wrong in holding that provisioning and billing are not "covered by the tariff." There are no such "gaps" in AT&T's SDN tariff. The tariff addresses both the provisioning and billing of SDN orders, and its provisions foreclose COT's specific claims.

With respect to provisioning, the tariff does not require that orders be provisioned in any particular number of days. Rather, the tariff states that after each individual order is placed, AT&T is to "establish and confirm a due date" in light of conditions that then exist, and make "reasonable efforts" to meet *that* date. *See* p. 7, *supra*. The tariff goes on to warn customers that even this "due date" may be missed and provides the customers the remedy of canceling service without incurring liability if the due date is missed by more than 45 days. *See id.* COT's claim that it had been guaranteed that its orders would be provisioned within 30-90 days -- regardless of the circumstances -- squarely conflicts with those provisions.

Similarly, the tariff forecloses COT's claim that AT&T breached agreements with it during the six month period in which COT elected the "multilocation billing" format. Although the tariff does not describe multilocation billing or any other *formats* for the bills, the tariff's billing provisions state that AT&T "will not" engage in the "allocat[ion]" of "usage" or "charges" among end user locations on an SDN network. *See* pp. 7-9, *supra*. Rather, the tariff provides that the

[21] Even if the filed tariff doctrine did not apply to provisioning and billing, the jury was erroneously allowed to consider a wide range of other claims that the Ninth Circuit assumed *were* covered by the doctrine. Allowing the jury to consider these other claims fatally infected the verdict.

customer (COT) is responsible for paying for all usage on its network when bills for service are issued and for allocating charges and usage among its end user locations. *Id.*[22]

Second, the Ninth Circuit's alternative holding would be erroneous even if AT&T's SDN tariff had been silent on the question of AT&T's responsibility to provision orders or to provide the specific multilocation billing services that COT claims. Both the terms of the Act and this Court's holdings establish that any such "gaps" in the tariff must be "filled in" uniformly as a matter of federal law, not by juries or courts enforcing alleged extra-tariff promises under state common law.

The *only* commercial relationship between AT&T and COT is that COT subscribed to AT&T's SDN service in exchange for COT's payment of the tariffed rate.[23] Thus, the

[22] Contrary to the Ninth Circuit, no "AT&T tariff expert" testified otherwise at trial on either provisioning or billing. Rather, in deposition testimony in another case, an AT&T employee stated that *details* of the rendering of bills and the provisioning of services are not specified in AT&T's tariff (ER 1774) -- as they are not. By contrast, the terms of the tariff foreclose the provisioning and billing guarantees that COT claims. In all events, it was error to submit the question of the meaning of AT&T's tariff to a jury for determination under state law, for questions of tariff interpretation are questions of law to be resolved under federal standards.

[23] As the Seventh Circuit recently held, matters might be otherwise only if there were two separate "promises" that were "severable," *e.g.*, if COT had both subscribed to SDN service in exchange for payment of the tariffed rate and AT&T had separately promised to "sell the plaintiff a bushel of Ugli fruit at market price." *Cahnmann* v. *Sprint Corp.*, 1998 U.S. App. LEXIS 118, *12 (7th Cir. Jan. 7, 1998). The Seventh Circuit held that there were no such separate promises in *Cahnmann*, and noted that the "probably" there was not in this case either, for the reasons stated in Judge Brunetti's dissent. *Id.*

question of what services COT is entitled to receive for payment of the tariffed rate is a question of tariff interpretations that is decided as a matter of federal law. *See Great N. Ry. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291 (1922); *Southern Ry.* v. *Prescott*, 240 U.S. 632, 636, 639-40 (1916). There is thus no "room" for state contract law. *See Cahnmann* v. *Sprint*, 1998 U.S. App. LEXIS 118 (7th Cir. Jan. 7, 1998) (Posner, J.).

By contrast, if "gaps" in a tariff could be filled by allowing state law claims like COT's, it would produce the very rebates, preferences, and privileges affecting rates that Section 203(c)'s terms prohibit. That was the Court's precise holding in *Kirby*, 225 U.S. 155, and *Davis*, 264 U.S. 560.

Indeed, it was the case in both *Kirby* and *Davis* -- as the Ninth Circuit majority believed it to be the case here -- that the tariff was silent on the carrier's duties in provisioning service. Notwithstanding that circumstance, both decisions hold that the only provisioning obligation to which the carrier can be treated as having agreed is that which could be "implied in the tariff" as a matter of federal law under principles of tariff interpretation: that is, to "use diligence" and to act reasonably. *Davis*, 264 U.S. at 561; *accord Kirby*, 225 U.S. at 164-65. Indeed, this Court not only has held that tariff obligations are to be interpreted under federal law,[24] but also has required that courts refer questions of tariff interpretation to the responsible agency under the primary jurisdiction doctrine to assure that those questions are resolved uniformly and in accord with the Act's substantive requirements.[25]

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[24] *Great Northern Ry.*, 259 U.S. at 290; *Southern Ry.*, 240 U.S. at 636, 639-40.

[25] *See United States* v. *Western Pac. R.R.*, 352 U.S. 59, 63-64 (1956).

This is not to say that tariffs must prescribe all details of the provision of tariffed service. There are many features of service and many choices to be made in implementing service requests under a tariff that do not affect charges, that do not have to be specified in tariffs, and that are worked out by carriers and their customers, subject only to the statutory prohibitions against unreasonable practices and discrimination and against deviations from that carrier's tariff. But it is a federal question whether an untariffed promise constitutes a privilege or practice that affects rates, and *Kirby* and *Davis* squarely hold that untariffed guarantees of the kinds of expedited and enhanced services that COT sought here cannot be imposed under state law, whether or not AT&T's tariff had specifically addressed these matters. Moreover, because AT&T's tariff covered these subjects and is inconsistent with COT's claims (*see* pp. 33-34, *supra*), COT's judgment in this case is patently improper.[26]

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[26] In its opposition to the petition for certiorari, COT sought to defend its judgment on the ground that AT&T's tariff does not limit its liability for "willful misconduct" and the jury found that AT&T's breaches of the untariffed side agreements were "willful." COT is confused. The tariff provision addresses the *amount* of AT&T's liability when it violates its tariff. *See* p. 9, *supra*. By contrast, it is not "willful misconduct" for AT&T to refuse to extend untariffed preferences to COT and thereby violate Section 203. That is what the law requires.

CONCLUSION

For the foregoing reasons, AT&T Corp. respectfully requests that the judgment of the Ninth Circuit be reversed.

Respectfully submitted,

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APPENDIX TO PETITIONER'S BRIEF

Sections 201-208 of the Communications Act of 1934,
47 U.S.C. §201-208 ..... 1a

Provisions of AT&T FCC Tariff No. 1 ..... 10a

TITLE II-COMMON CARRIERS

Part I - COMMON CARRIER REGULATION

SEC. 201. [47 U.S.C. 201] SERVICE AND CHARGES.

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful: *Provided*, That communications by wire or radio subject to this Act may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this Act or in any other provision of law shall be construed to prevent a common carrier subject to this Act from entering into or operating under any contract with any common carrier not subject to this Act, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this Act or in any other provision of law shall prevent a common carrier subject to this Act from furnishing reports of positions

of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commissioner may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.

SEC. 202. [47 U.S.C. 202] DISCRIMINATION AND PREFERENCES.

(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services, whenever referred to in this Act, include charges for, or services in connection with, the use of common carrier lines of communications, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $6,000 for each such offense and $300 for each and every day of the continuance of such offense.

SEC. 203. [47 U.S.C. 203] SCHEDULES OF CHARGES.

(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire

or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this Act when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) (1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after one hundred and twenty days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

(c) No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation, for such communication, or for any service in

connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities, in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $6,000 for each such offense, and $300 for each and every day of the continuance of such offense.

SEC. 204. [47 U.S.C. 204] HEARING AS TO LAWFULNESS OF NEW CHARGES; SUSPENSION.

(a) (1) Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after such charge,

classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed new or revised charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed charge for a new service or a revised charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such charge for a new service or revised charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or revised charges as by its decision shall be found not justified. At any hearing involving a new or revised charge, or a proposed new or revised charge, the burden of proof to show that the new or revised charge, or proposed charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

(2) (A) Except as provided in subparagraph (B), the Commission shall, with respect to any hearing under this section, issue an order concluding such hearing within 5 months after the date that the charge, classification, regulation, or practice subject to the hearing becomes effective.

(B) The Commission shall, with respect to any such hearing initiated prior to the date of enactment of this paragraph, issue an order concluding the hearing not later than 12 months after such date of enactment.

(C) Any order concluding a hearing under this section shall be a final order and may be appealed under section 402(a).

(3) A local exchange carrier may file with the Commission a new or revised charge, classification, regulation, or practice on a streamlined basis. Any such charge, classification, regulation, or practice shall be deemed lawful and shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which it is filed with the Commission unless the Commission takes action under paragraph (1) before the end of that 7-day or 15-day period, as is appropriate.

(b) Notwithstanding the provisions of subsection (a) of this section, the Commission may allow part of a charge, classification, regulation, or practice to go into effect, based upon a written showing by the carrier or carriers affected, and an opportunity for written comment thereon by affected persons, that such partial authorization is just, fair, and reasonable. Additionally, or in combination with a partial authorization, the Commission, upon a similar showing, may allow all or part of a charge, classification, regulation, or practice to go into effect on a temporary basis pending further order of the Commission. Authorizations of temporary new or increased charges may include an accounting order of the type provided for in subsection(a).

SEC. 205. [47 U.S.C. 205] COMMISSION AUTHORIZED TO PRESCRIBE JUST AND REASONABLE CHARGES.

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be

thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $12,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

SEC. 206. [47 U.S.C. 206] LIABILITY OF CARRIERS FOR DAMAGES.

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequences of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

SEC. 207. [47 U.S.C. 207] RECOVERY OF DAMAGES.

Any person claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

SEC. 208. [47 U.S.C. 208] COMPLAINTS TO THE COMMISSION.

(a) Any person, any body politic or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(b) (1) Except as provided in paragraph (2), the Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation,

or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed.

(2) The Commission shall, with respect to any such investigation initiated prior to the date of enactment of this subsection, issue an order concluding the investigation not later than 12 months after such date of enactment.

(3) Any order concluding an investigation under paragraph (1) or (2) shall be a final order and may be appealed under section 402(a).

2.3. RESPONSIBILITIES OF THE COMPANY

2.3.1. Liability

A. The Company's liability, if any, for its willful misconduct is not limited by this tariff. With respect to any other claim or suit, by a Customer or by any others, for damages associated with the installation, provision, termination, maintenance, repair or restoration of LDMTS, and subject to the provisions of B. through G. following, the Company's liability, if any, shall not exceed an amount equal to the initial period charge provided for under this tariff for the LDMTS call for the period during which the call was affected or, for a DIAL-IT 900 Service Sponsor, shall not exceed an amount equal to the charge a Sponsor would pay pursuant to Section 5.1.3.B.4. following, if the Sponsor received no calls during the program day for which the DIAL-IT 900 Service was affected. This liability for damages shall be in addition to any amounts that may otherwise be due the Customer under this tariff as a credit allowance (see Credit Allowances for Interruptions, page 29).

B. The Company is not liable for damages associated with service, channels, or equipment which it does not furnish.

C. The Company is not liable for damages to a premises resulting from the furnishing of LDMTS, including the installation and removal of equipment and associated wiring, unless the damage is caused by the Company's negligence.

D. The Company shall be indemnified, defended, and held harmless by the Customer and User against all claims, losses,

or damages arising from the use of LDMTS furnished pursuant to this tariff, involving:

1. Claims for libel, slander, invasion of privacy, or infringement of copyright arising from any communication;

2. Claims for patent infringement arising from combining or using LDMTS furnished by the Company in connection with facilities or equipment furnished by others; or

3. All other claims arising out of any act or omission of others relating to LDMTS provided pursuant to this tariff.

E. The Company does not guarantee or make any warranty with respect to LDMTS when used in an explosive atmosphere. The Company shall be indemnified, defended, and held harmless by the Customer and User against all claims, losses or damages by any person relating to LDMTS provided pursuant to this tariff when used in an explosive atmosphere.

2.4. RESPONSIBILITIES OF THE CUSTOMER

2.4.1. General - The Customer's general responsibilities are described in this section. When Customer equipment or a Customer-provided communications system is connected to LDMTS, the Customer assumes additional responsibilities that are described in the Connections section of this tariff (see Connections, page 30).

A. Placement of Orders, Payment of Bills and Compliance with Regulations - The Customer is responsible for placing any necessary orders and complying with tariff regulations for LDMTS and for assuring that its Users comply with tariff regulations. The Customer is also responsible for the payment

of bills for LDMTS. This includes payment for LDMTS calls or services:

- Originated at the Customer's number(s),
- Accepted at the Customer's number(s) (e.g., Collect Calls),
- Billed to the Customer's number via Third Number Billing if the Customer is found to be responsible for such call or service, the use of a Calling Card, or the use of a Company-assigned Special Billing Number, and
- Incurred at the specific request of the Customer.

The Customer may appoint an agent to act on its behalf, as specified in B. following.

1. Information the Customer Must Provide - When a Customer places an order for LDMTS, the following information must be provided:

   - The Customer contact name, telephone number, and address at each premises where installation will be made, and

   - The Customer's billing name and address.

B. Agency Agreement - The Company will accept orders from an agent appointed by the Customer. An agency appointment must be sent to the Company in writing. If directed by the Customer, the bill for LDMTS will be sent to the agent. The bill will be issued in the name of the Customer, in care of the agent.

The Customer retains responsibility for compliance with tariff regulations and any act or omission of the agent, regardless of

any limitations the Customer may place on the agent's authority.

C. Establishing Identity

1. The calling party is responsible for establishing its identity as often as necessary during the course of a call.

2. The calling party assumes full responsibility for identifying the station, party, or person with whom connection is made at the called number or numbers.

2.5. PAYMENTS AND CHARGES

2.5.1. General - The charges for an LDMTS call except for optional calling plans are applied on a per call basis. Other LDMTS offerings are charged on a monthly basis. Applicable recurring and/or non-recurring charges are contained in Sections 3 through 6 of this tariff.

2.5.2. Application of Charges - The rates and charges that are in effect in this tariff when LDMTS is furnished are the rates and charges used to determine the Customer's bill. If the rates for services furnished on a monthly basis change after a bill has been rendered, the bill will be adjusted to reflect the new charges (see Fractional Charges and Credits following on page 28.1).

2.5.3. Payment of Charges - Payment for LDMTS is due upon presentation of the bill. LDMTS may be denied for nonpayment of a bill (see Violation of Regulations, page 43). In addition, the following payment provisions are also applicable to LDMTS:

A. When the Company provides the billing function for LDMTS Customers in Minnesota who obtain their local exchange service from Northwestern Bell Telephone Company, starting September, 1985 and ending not later than August 31, 1989, the following applies:

1. For business Customers, payment of charges is due upon presentation of the bill.

2. For residence Customers, payment of charges will be made in accordance with one of the following options:

(a) The payment of all charges is due upon presentation of the bill, or

(b) Customers who have selected a minimum payment option prior to May 1, 1988 may elect to pay all charges in full, or make a minimum payment, upon presentation of the bill. The minimum payment will be $20.00 or 25 percent of the unpaid charges, whichever in greater. The Customer may continue to select the minimum payment option for charges billed through the and of July 31, 1988. However, all new charges billed after July 31, 1988 are due upon presentation of the bill. All outstanding balances must be paid in full prior to the end of August 31, 1989.

When a residence Customer has not paid the entire bill and uses the minimum payment provision, the unpaid portion of the monthly bill is subject to a monthly finance charge of 1.5 percent on the average daily balance.

B. When a local exchange company provides the billing function on behalf of the Company, the local exchange company's local exchange service payment of charges regulation applies.

2.5. PAYMENTS AND CHARGES (Continued)

2.5.4. Late Payment Charge - When a local exchange company provides the billing function on behalf of the Company, the local exchange company's local exchange service late payment charge applies.

2.5.5. Advance Payment - An advance payment will be required before service is provided only when a Customer has a history of late payments to the Company or when a Customer's financial responsibility is not a matter of record. The advance payment will be the non-recurring charge(s), if any; one month's recurring service charge; and one month's estimated usage charges for LDMTS other than DIAL-IT 900 service. The advance payment for DIAL-IT 900 service will not exceed the non-recurring charge(s) and the charge associated with the minimum daily call minute or call volume requirement for 30 days. The advance payment will be credited on the Customer's initial bill. A deposit may apply in addition to an advance payment (see Deposits, following).

2.5.6. Deposits - The following deposit provisions are applicable to LDMTS:

A. When the Company provides the billing function for LDMTS, the Company will require only a Customer who has a proven history of late payments to the Company or whose financial responsibility is not a matter of record to make a deposit to be held as a guarantee for the payment of charges. A deposit does not relieve the Customer of the responsibility for the prompt payment of bills on presentation. In lieu of a cash deposit, the Company will accept, as a deposit, Bank Letters of Credit and Surety Bonds. An advance payment may be required in addition to a deposit (see Advance Payment, Section 2.5.5. preceding).

1. Deposit Amount

(a) The deposit for LDMTS other than DIAL-IT 900 service will not exceed an amount equal to twice the estimated average monthly usage charges and/or the monthly recurring charges.

(b) The deposit for DIAL-IT 900 service will not exceed an amount equal to twice the charge associated with the minimum daily call volume or call minute requirement for 30 days.

2. Interest on a Cash Deposit - Interest will be paid to a Customer for the period that a cash deposit is held by the Company. The interest rate used will be simple interest at the rate of six percent annually unless a different rate has been established by the appropriate legal authority in the state where the LDMTS offering is located.

3. Return of a Deposit - Any deposit collected will be credited to a Customer's account, when the Customer has established credit, or when the Customer has established a prompt payment record with the Company for one year. When the service for which the deposit has been required is discontinued, the deposit is applied to the final bill and any credit balance is refunded to the Customer with applicable interest accrued.

B. When a local exchange company provides the billing function on behalf of the Company, the local exchange company's local exchange service deposit regulation will apply.

Interest on the cash deposit and return of the deposit will also be as specified in the local exchange company's local exchange service deposit regulation.

2.5.7. Return Check Fee - When the Company provides the billing function for LDMTS Customers in Minnesota who obtain their local exchange service from Northwestern Bell Telephone Company, an administrative charge is applied to a residence or business Customer bill for each occasion that a check, bank draft, or an electronic funds transfer item is returned for the reason of insufficient funds or no account.

	Administrative Charge
- Per occasion (Return Check Fee)	$14.45

2.5.8. Minimum Payment Period and Notice of Discontinuance

A. Minimum Payment Period - The minimum payment period is the minimum period, if any, for which the Customer is required to make payment for the LDMTS offering. The charges applicable for this period include the minimum recurring charge(s) plus any nonrecurring and/or special construction charge(s) that may be due.

The minimum payment period is calculated from the date that billing starts after (1) the initial installation, or (2) a reinstallation after a change.

Minimum payment period charges apply if the Customer discontinues an LDMTS component before the specified minimum payment period expires. The minimum payment period for a given LDMTS component is specified in the section of this tariff applicable to that LDMTS component.

B. Notice of Discontinuance - AT&T requires notice when LDMTS is to be discontinued. The required notice period and the application of discontinuance charges, if any, are specified for each LDMTS Offering in this tariff.

2.5.9. Types of Charges - There are two types of charges associated with LDMTS, recurring and nonrecurring.

A. Recurring Charges - Recurring charges are incurred on a monthly or per unit of use basis, as specified for each LDMTS offering.

1. Monthly Charge - A flat charge applies for each month in which service is furnished and is prorated for a fractional month of service. Monthly charges start on the day after the service is installed, but not before the due date of the order unless the Customer agrees to an earlier installation. Charges accrue through and include the day that service is discontinued. Monthly charges are billed in advance, except where prohibited by law. When the billing date and the date that the service is started, changed, or discontinued do not coincide, the charges will be adjusted to reflect the fractional part of the month involved (see Fractional Charges and Credits, page 28.1). For billing purposes, each month is considered to have 30 days.

2. Usage Charge - Usage charges are stated as a function of , and vary with, use (e.g., per connection or per unit of time). Usage charges are billed in arrears.

B. Nonrecurring Charges - A nonrecurring charge applies for each activity, such as an installation or a change, ordered by the Customer and performed by the Company. Charges may differ according to the work activity involved, as specified for each LDMTS offering.

1. Installation Charge - A fixed charge per unit applies when certain LDMTS components are furnished.

2. Service Ordering Charge - A fixed charge Applies for receiving, recording and processing a Customer order for installation, move, or record change related to LDMTS. The service ordering charge varies according to the type of activity involved. When an order contains more then one activity, the highest service ordering charge will apply.

2.5.10. Cancellation, Delay or Change of an Order - The regulations set forth in this section apply for canceling, delaying or changing an order for any LDMTS components except for LDMTS components in Section 3, Conference Services in Section 4, or Other Services in Section 5 to which monthly charges normally apply.

When an order for service is placed, a due date will be established and confirmed with the Customer. If the due date is delayed, the appropriate terms and conditions outlined in A. or B. following apply:

A. Delay of a Due Date by the Customer - A Customer may delay the due date of an order involving the installation or change of LDMTS when:

- The request for the delay is received by the Company prior to the order's due date, and
- The total delay measured from the order's initial due date does not exceed 30 cumulative calendar days.

Orders involving the discontinuance of service may be delayed at any time prior to the due date. There will be no maximum delay period for these orders.

A. Customer having delayed an order for the maximum 30 cumulative calendar day period may not delay the order again. The Customer instead has the option to (1) accept billing for the service ordered, or (2) cancel the order and pay the applicable nonrecurring charge(s) for the service ordered. The billing or cancellation is effective on the 30th cumulative calendar day of the delay.

If the Customer elects to accept billing, the installation will be completed as soon as reasonably practical after the Customer advises the Company.

B. Delay of a Due Date by the Company - The Company will make every reasonable effort to assure that the LDMTS offering ordered is furnished on the due date. However, in some cases a delay in the installation may be unavoidable. If an order is delayed beyond its due date for more than 45 cumulative calendar days and such delay is not requested or caused by the Customer, the Customer may cancel the order without penalty or payment of nonrecurring charges.

C. Cancellation of an Order - A Customer may cancel an order at any time prior to the due date. An order is considered to have been canceled when the Company receives a notification of cancellation from the Customer. Such notification may not be retroactive.

Cancellation Charge(s) will apply as follows, unless caused by Company delay as specified in B. preceding, or otherwise specified in the section applicable to the specific service:

1. When the Customer cancels an order prior to the start of plant work activity, the Service Ordering Charge relative to the activity involved will apply.

2. Installation of a service order is considered to have started when the Company begins to process a service order.

3. When the Customer cancels an order after plant work has started, a charge equal to the costs incurred in such installation will apply, less estimated net salvage. This charge will include the nonrecoverable cost of equipment and material ordered, provided or used, plus the nonrecoverable cost of installation and removal including the costs of engineering, labor, supervision, transportation, rights of way and other associated costs. Estimated net salvage will be based on recoverable cost of reusable equipment and material.

D. Cancellation Involving Special Construction - If a Customer cancels an order which involves special construction, the applicable charges for the special construction are those set forth in Tariff F.C.C. No. 5. Those charges are in addition to any charges which are applicable under this tariff for the cancellation of an order.

2.5.12. Optional Billing Arrangements - When an LDMTS call is not billed to the calling station, the Company offers certain billing options depending on the type of call. These options, which are not available for DIAL-IT 900 Service specified in Section 5 are:

A. Collect Calls - This option allows a call to be billed to the called station, if the charges are accepted by the called party, station, or number. Collect Calls are not acceptable at a public or semi-public coin station. In lieu of a collect call to a public or semi-public coin station, the charges may be billed to a Calling Card as specified in B following, or to a Third Number as specified in C following, or the call may be re-originated from the called station.

B. Calling Card - This option enables a Customer to charge a call to an authorized Calling Card. Calls charged to a Local Exchange Company Calling Card or an AT&T Card will then be included on the LDMTS bill for the Main Billed Account with which the card is associated. Calls charged to a commercial credit-charge card must be made from a suitably equipped telephone. Charges for the LDMTS call will be reflected on the statement issued by the respective commercial credit-charge card institution.

C. Third Number Billing - This option allows a call to be billed to a telephone number identified with a station other than the calling or called one. Charges to be billed to a third number are subject to verification by the Company that they will be accepted at the third number, prior to completion of the call. Other efforts may be undertaken subsequently by the Company, as necessary, to determine responsibility for payment of such calls.

LONG DISTANCE MESSAGE
TELECOMMUNICATIONS SERVICE

SECTION 6 - CUSTOM NETWORK SERVICES

6.1. DESCRIPTION

6.1.1. General - Custom Network Services are offered to meet Customer needs for specialized LDMTS.

6.2. REGULATIONS

6.2.1. General - In addition to the General Regulations in Section 2. preceding, the following apply:

6.2.2. Minimum Payment Period - The minimum payment period for Custom Network Services components is three months except for the Software Defined Network optional features, Custom Switched Network Service, International City Center Service and AT&T MEGACOM Service. The minimum payment period for the Software Defined Network optional features, Custom Switched Network Service, International City Center Service and AT&T MEGACOM Service is one month.

6.2.3. Notice of Discontinuance - The Customer's order to discontinue Custom Network Services must be received by this Company one month prior to the day on which the service is to be discontinued, except for Software Defined Network service for which three months notice is required. Monthly recurring charges apply for that period from the date the Company receives the discontinuance notice or until the requested discontinuance date, whichever is later. The charges will

continue to apply whether or not the Customer continues to use the service.

6.2.4. Allocation of Usage or Charges - The company will not allocate the usage of a Custom Network Service or the charges for such usage and is not responsible for the way the Customer may allocate usage or charges among multiple Users, except when a Customer subscribes to Custom Software Defined Network Service Location Account Billing Option (see Section 6.4.1.B.2.).

6.2.5. Provision of Services - Custom Network Services are fully supported by the Company through engineering, installation and maintenance efforts. The Company will assure that each service functions properly within its specified transmission and switching parameters.

A. Engineering - The Company will engineer to the specifications and parameters of the service provided.

B. Installation - When installation of a component is required it will be installed subject to the availability of installation personnel and equipment. Installations will usually be made during normal working hours.

C. Maintenance - The Company will maintain and repair the services which it provides.

D. Hazardous Locations - A Company-provided access line will not be furnished at a location the Company considers hazardous (e.g., explosive atmosphere environments). In such cases, the Company, if so requested, will terminate the access line at a mutually agreeable alternate location. The Customer will then be responsible for extension of the access line to the hazardous location.

6.2.6. Transfer or Assignment - Custom Network Services may be transferred or assigned to a new Customer, provided that:

A. The Customer of record (former Customer) requests in writing that the Company transfer or assign the service to the new Customer.

B. The new Customer notifies the Company in writing that it agrees to assume all obligations of the former Customer at the time of transfer or assignment. These obligations include: (1) all outstanding indebtedness for the service, and (2) the unexpired portion of any applicable minimum payment period(s).

C. The service is not interrupted or relocated at the time the transfer or assignment is made.

D. The Company agrees in writing to the transfer or assignment.

The transfer or assignment does not relieve or discharge the former Customer from remaining jointly and severally liable with the new Customer for any obligations existing at the time of transfer or assignment. These obligations include: (1) all outstanding indebtedness for the service, and (2) the unexpired portion of any applicable minimum payment period(s).

6.2.7. Multi-Location Calling Plan (MLCP) - Certain Custom Network Services are available as part of the MLCP. The terms and conditions of the MLCP are described in Section 6.9. following.

6.2.8. Use of Custom Network Services For Resale or Shared Use - When Custom Network Services are resold or shared, the

Customer may advise its User that a portion of the Customer's service is provided by this Company. However, the Customer shall not represent that this Company jointly participates in the provision of the Customer's services.

6.4. SOFTWARE DEFINED NETWORK SERVICE

6.4.1. General - Software Defined Network Service (SDN) is a switched telecommunications service which permits a Customer to establish a communications path between two stations by using uniform dialing plans. Customer's stations are connected by access lines to designated AT&T Central Offices as set forth in Section 6.3. preceding. SDN is available as either a Basic or Custom service.

A. Basic SDN - Basic SDN allows the Customer to establish service with no service establishment charge. However, the Customer must commit to a minimum service period of three years. Basic SDN may be upgraded to Custom SDN. The Usage Reduction Plan and Expanded Volume Plan apply to Basic SDN (see 6.4.3.C.7. and 6.4.3.C.8. following). Basic SDN included the following features:

- Station-to-Station Dialing
- Uniform ten-digit on-network or off-network dialing plan
- Customer-selection of Terminating Calls Per location, calls may terminate on-network, on-network and off-network or the combination of on-network, off-network and international.
- International Calling Capability
- Subaccount Identification Code
  Allows the Customer to identify calls via an assigned three-digit code, which is dialed when a call is placed.

B. Custom SDN - Custom SDN allows the Customer to establish service under Options 1, 2, 3, or 4. Options 1 through 3 allow the Customer to establish service at a reduced service establishment charge. However, the Customer must commit to a minimum service period as specified following. The Service Establishment charges for Options 1 through 3 may be paid under a flexible payment plan as specified in 6.4.3.A.1.(a) following. Option 4 allows the Customer to establish service at the standard service establishment charge which may be paid under a flexible payment plan as specified in 6.4.3.A.1.(a) following.

Custom SDN Option	Term of Service
1	3 Years
2	2 Years
3	1 Year
4	1 Month

The Usage Reduction Plan and Expanded Volume Plan apply to Custom SDN Options 1 through 4 (see 6.4.3.C.7. and 6.4.3.C.8. following). Custom SDN includes the following features:

- Available seven-digit, ten-digit or both on-network Dialing Plan (On-network stations using local exchange service access must dial ten digits).
- Uniform ten-digit off-network Dialing Plan
- Station-to-Station Dialing
- International Calling Capability

1. Optional Features - The following optional features are available with Custom SDN:

- Call Screening Authorization Codes
- Seven-Digit International Dialing

- Service Management System (SMS)
- Network Remote Access
- Private Network Interface
- Digital Routing
- Network Intercept Announcements
- Flexible Routing
- Off-Network Overflow On Terminating Busy
- Partitioned Data Base Management
- Access Line Grouping Call Screening
- Location Sharing

In addition, the Custom SDN Customer may select the Location Account Billing Option as specified below:

2. Location Account Billing Option - The Location Account Billing Option allows Custom SDN Customers to include on their networks, under separate bills, locations which operate with the Customer in a common business, using a common brand or trade name, and which (i) the Customer owns or franchises, or (ii) as to which the Customer provides centralized management, oversight or coordination. (For example, a wholesaler could include its retail outlets, a distributor could include its authorized dealers or agents, a manufacturer its authorized service and repair agents, and a national organization its local units to which it provides central direction.) The SDN Customer is responsible for designating the locations that will be included on the network and for placing all service orders to add, delete or change such locations. Each designated location will be billed separately for its service, and the billed entity will be solely responsible for payment to AT&T, and for compliance with all tariff regulations. A Customer may designate a maximum of 6000 locations to receive separate bills under this option. Usage from all such locations will be included in the Customer's usage under the Expanded Volume Plan and the Usage Revenue Plan.

6.4.2. Regulations

A. Mileage Measurements - The mileage for Software Defined Network calls is the distance in airline miles mileage between (1) the rate centers associated with the originating and terminating stations (Schedule A); (2) the V&H coordinates associated with an AT&T Central Office and the rate center associated with a station (Schedule B); or (3) the V&H coordinates associated with an originating and terminating AT&T Central Office (Schedules C and D). Each rate center (determined by NPA centroid or NPA-NXX) or AT&T Central Office has a unique set of assigned vertical and horizontal (V&H) coordinates as described in this Company's Tariff F.C.C. No. 10. These coordinates are used for calculating mileage. Airline mileage is calculated as specified in Tariff F.C.C. No. 10.

B. Deferred Payment Promotion Plan - As a promotional offering, the deferred payment promotion plan allows Customers, who order SDN between February 3, 1989 and May 4, 1989, the option to spread the payment of all non-recurring charges associated with the initial design and installation of SDN, over a 12- or 36-month period. The deferred payment promotion plan is not available when the Customer selects the flexible payment plan (see 6.4.3.A.1.(a) following) associated with Custom SDN. Customers who terminate service before the end of the 12 or 36-month period will be responsible for paying the remaining balance on the installation charges immediately.

C. Trial Offering - Customers may subscribe to either Basic or Custom SDN with a maximum of five access line groupings, on a trial basis for a period of 180 days without incurring any liability for the service establishment charge for Custom SDN or without making a minimum service period

commitment for either Basic or Custom SDN Options 1, 2 or 3. At the end of 90 days, the Customer may increase the number of access line groupings. All other tariff charges are applicable during the trial period. Upon expiration of the 180-day period, unless prior notification is made to AT&T by the Customer, the full terms and conditions of the SDN option selected will become effective.

Supreme Court, U.S.
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No. 97-679

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

AT&T CORP.,

Petitioner,

v.

CENTRAL OFFICE TELEPHONE, INC.,

Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF

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QUESTIONS PRESENTED

Should the filed rate doctrine be extended to:

1. Bar claims by competitors,

2. Bar intentional tort claims that do not seek to enforce a discriminatory rate,

3. Prohibit recovery when a carrier engages in willful misconduct, unrelated to rates,

4. Prohibit recovery for carrier breaches of gap filling provisions (contractual agreements regarding terms which do not affect rates), or

5. Bar contract claims between carriers when the Communications Act allows carrier-to-carrier contracts?

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STATEMENT OF THE CASE

I. STATEMENT OF FACTS

A. The Parties

Central Office Telephone, Inc. ("COT") is a switchless reseller of long-distance telecommunication services. AT&T is a facilities-based long-distance carrier. Switchless resellers purchase "bulk" services from facilities-based carriers and resell those services (as carriers) to their own customers. Switchless resellers qualify for significant discounts by combining the business of multiple end users who would not individually qualify for volume discounts at the same level. COT was thus both a customer and a competitor of AT&T.

B. AT&T Promotes SDN to Switchless Resellers

In the fall of 1989, AT&T initiated special promotions to encourage resellers to resell AT&T's "Software Defined Network" ("SDN") to end-users, even though this would increase competition for AT&T's end-user customers. AT&T initiated these special promotions as a counter to competition from MCI and Sprint. ER 365-66. [1] SDN is a virtual private network service that allows an AT&T customer, in consideration for a commitment to

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[1] For the purposes of this brief, the following citation abbreviations apply: Ninth Circuit Excerpts of Record: ER; Ninth Circuit Supplemental Excerpts of Record: SER; Joint Appendix: J.A.

purchase large volumes of long distance usage, to receive substantially higher discounts than provided for other available AT&T long-distance services. ER 589-90, 2529, 3526, 3545, 3021-23.

C. COT Signs Up for SDN

In response to the AT&T promotions, COT decided to purchase AT&T's SDN services. On October 30, 1989, COT signed a letter agreement memorializing its selection of SDN Expanded Volume Program Plan 2, including Custom SDN. AT&T Brief Appendix (hereinafter "AT&T Br. App.") 27a. Under this plan, COT would receive up to a 20% discount off basic SDN rates in exchange for a renewable commitment to purchase 2 million minutes of SDN annually. J.A. 26; ER 431, 3721-24. COT also selected the SDN Multiple Location Billing ("MLB") Option under which AT&T would bill up to 6,000 of COT's customer locations at no extra charge. ER 414-16. SDN rates were tariffed; MLB was not tariffed. ER 3148.

COT experienced provisioning delays shortly after it began selling SDN services. To address these delays, AT&T suggested that COT "park" its customers under a new and different tariffed service known as Multi-Location Calling Plan ("MLCP"). ER 418-21. Its stated purpose was to serve COT's customers' long-distance needs until they could be provisioned onto SDN. Id. COT signed up for MLCP on March 8, 1990. ER 417, 3737-38A.

On April 9, 1990, AT&T informed COT that its first account had been placed onto the SDN (ER 432) and that COT could now upgrade its SDN commitment.

Believing that SDN services were finally functional, COT upgraded its SDN subscription to Plan 6, which offered a larger discount (up to 25%) in exchange for a larger volume commitment (15 million minutes annually). ER 431, 4037.

D. AT&T Decides to Drive Switchless Resellers Out of Business

Unbeknownst to COT, on or about March 1, 1990, a new management team within AT&T, under the direction of Michael Keith, determined that SDN switchless resellers constituted a threat to AT&T's profitable PRO-WATS offers to small businesses. ER 1211. In a reversal of its previous stratagem of soliciting switchless resellers, AT&T decided that the switchless resellers should be eliminated, and that they should henceforth be treated as unwanted competitors. J.A. 56-58, 54-55. Mr. Keith directed the formation of a Committee to "kill" the arbitrage by which resellers conducted their business. J.A. 63 64; ER 1203-19.

Mr. Keith's Committee developed multiple "roadblocks" (ER 1044-45) to modify the SDN offer so as to eliminate switchless resellers.[2] J.A. 64. The "roadblocks" began to surface soon after COT contracted with AT&T:

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[2] A memorandum prepared by Mr. Keith stated that the reason for modifying SDN was to "deflect cockroaches." J.A. 64. At that time AT&T managers were referring to resellers as "cockroaches and slimes and convicts. . ." J.A. 63.

(1) AT&T provisioned SDN service for switchless resellers at a glacial pace. ER 458. Eight months after activating his Committee, Mr. Keith predicted: "With a one percent provisioning rate [resellers] won't be around much longer." ER 1277.

(2) AT&T's telemarketers contacted COT's SDN customers and, without authorization, converted them to AT&T long-distance service, a practice known as "slamming." ER 746, 1579, 1877, 4278-96.

(3) AT&T misappropriated customer information from COT's confidential database. ER 3094.

(4) AT&T failed to implement the MLCP orders that COT submitted and failed to advise COT that it had not implemented the orders until months later; by that time, many of COT's customers had departed. ER 423, 480-81, 738, 1664, 1963, 2612, 4205-06.

(5) Contrary to its tariff (AT&T Br. App. 28a), AT&T billed for its services through a billing option ("LABO") that COT had rejected as inappropriate for its business. ER 414. Using LABO, AT&T delivered bills to COT's customers allocating to them 100% of COT's discount, with the result that COT did not receive any revenues. ER 468-69, 471, 968, 1709, 1754.

(6) AT&T adopted a policy against allowing cash payments due to COT and other resellers resulting from other AT&T discounts, intending to "kill the resellers' cash flow." ER 1344, 3739-41.

(7) Through a practice known as "suppressed" billing, AT&T did not bill COT's customers for months after they had used COT's services. ER 517, 1898-99. Suppressed billing suspended payments that were due to COT, and it made COT's customers irate and unwilling to pay amounts that were in fact due. ER 488, 524-26, 1576, 4263, 4308.

(8) AT&T denied COT and other resellers SDN calling cards, account teams, and SDN User Association memberships (which AT&T provided to its other customers), and blocked international calling card calls offered under COT's chosen tariff option. AT&T Br. App. 27a; ER 403, 440-42, 696-97, 748-50, 753-55, 830, 1837-40, 1874-75, 2577.

(9) AT&T transferred COT and other switchless resellers from local AT&T account teams to a Central Development and Operations Center in New Jersey (the "CDOC"), which AT&T knew would provide minimal service. ER 440-42, 1890-91. Indeed, several weeks after COT had been sending MLCP orders, as instructed, to the CDOC, an AT&T staffer finally called to ask "who Central Office Telephone was, and what in the world was all this paper [it was sending to New Jersey]." ER 1847. He then stated that he "would not process [COT's] MLCP orders." ER 1848.

(10) Despite COT's request, AT&T refused to acknowledge responsibility to COT's customers for the many problems they were encountering. ER 486, 516-17, 1893-94.

Through these and other "roadblocks," AT&T nearly drove COT out of the reseller business. To survive, COT was forced to terminate its contract with AT&T in September 1992, with one and one-half years remaining on the contract. ER 486, 515-17, 1942. As of the termination date, COT had lost over 75% of its customer base. ER 3085.

The foregoing review of the facts presented to the jury is necessary because AT&T's 14 page recitation of its view of the case essentially advocates impeachment of the jury verdict. AT&T virtually ignores that COT was its competitor, and that a jury disbelieved AT&T's attempted explanations for its anti-competitive conduct.

II. PROCEEDINGS BELOW

COT sued AT&T in 1991 asserting, among others, state law claims for intentional interference with business relationships and for breach of contract based upon AT&T's willful misconduct. J.A. 3. These two claims are the ones that were tried to the jury in the summer of 1994. J.A. 77.

The jury was instructed, without objection, concerning COT's claim for damages for intentional interference with its business relationships with customers:

> COT asserts that AT&T intentionally interfered with its business relations and expectations of future business relations with its customers, the end users of its SDN service. In order to prevail on this claim, COT must prove by a preponderance of the

> evidence, one, that COT had business relations with the probability of future economic benefit. Two, that AT&T was aware of the relationships and expectation of future benefits. Three, that AT&T intentionally interfered with COT's business relations. Four, that AT&T interfered for an improper motive or by using improper means. And, five, that COT suffered economic injury as a result of the interference.

J.A. 70.

The jury was also instructed: ". . . AT&T may be liable to COT for breach of contract only if AT&T engaged in willful misconduct. . . . Willful misconduct is defined as an intentional act or omission performed either with the knowledge that the act or omission will probably harm someone else, or in a manner that implies reckless disregard of probable consequences to others." J.A. 70.

The jury found in favor of COT on each claim, and awarded $13 million in actual damages, later reduced by the trial court to $1.154 million. The trial court denied AT&T's motion for judgment notwithstanding the verdict, stating:

> "COT's claims for breach of contract and intentional interference with prospective business advantage were tried to the jury, which was instructed that it could award damages only if it found that AT&T had

> engaged in willful misconduct . . . I am satisfied . . . that sufficient evidence supported the jury's conclusions as to liability on COT's claims and AT&T's counterclaim." AT&T Petition for Certiorari Appendix (hereinafter "AT&T Petn. App.") 33a, 35a, 36a.

On appeal, the Ninth Circuit affirmed as to liability, and remanded for trial on punitive damages. With respect to AT&T's filed rate doctrine argument, the Ninth Circuit held, among other things, that because COT's claims did not involve rates or rate-setting, the doctrine did not apply.

Judge Brunetti dissented. His dissent is based on the view that COT demanded, in the language of AT&T's "Question Presented" (AT&T Br. i), "better, costlier, and more valuable services than required by the terms of the governing tariff and received by similarly situated customers." Yet there was no evidence put before the jury of better, costlier or more valuable services being sought[3] --

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[3] Every time throughout AT&T's appellate briefing of this case that the terms "side deals," "preferences," "better service," costlier service," "more valuable service," guaranteed service," and "enhanced service" appear, and they have appeared constantly, the terms have been nothing more than the characterizations of AT&T's appellate counsel. At no point in the trial record before the jury did AT&T's counsel apply any one of these characterizations to COT's claims, nor was there any evidence offered to show that the services AT&T agreed to provide COT were "better," "costlier" or "more valuable" services than AT&T offered to similarly situated customers. Likewise, there was no testimony on the part of any witness at trial, or contention by AT&T's trial attorneys, that COT was challenging the "reasonableness" of any

only that the services contracted for had been willfully withheld.

SUMMARY OF ARGUMENT

1. The filed rate doctrine was created to protect consumers in highly regulated, monopolistic industries. In order to prevent gouging or discriminatory conduct, service providers were required to submit their rates and rate-affecting terms to regulators, who would determine whether the terms were reasonable and non-discriminatory. The filed rate doctrine was intended to prohibit circumvention of the tariffs designed to protect customers. The filed rate doctrine should not be extended beyond its original purpose.

The filed rate doctrine should not be extended to competitor claims. As determined by four of the five circuits faced with this question, the doctrine's purpose, protection of customers from gouging and other discriminatory conduct, is not accomplished by applying the doctrine to competitor claims.

2. This Court established over a century ago that carriers are prohibited from limiting their liability by tariff for claims based upon willful misconduct. Primrose v. Western Union Tel. Co., 154 U.S. 1, 14 S. Ct. 1098

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tariffed charge. Rather, the testimony was directed to the admitted failure of AT&T to provide the services for which COT contracted. There is simply no trial record supporting AT&T's position in this appeal.

(1894). Thus, carrier tariffs do not preclude an intentional tort claim arising under state law, at least where, as here, the claim does not seek to enforce a discriminatory rate or require the Court to determine a reasonable rate. COT's claims had nothing to do with a misquoted or misrepresented rate. COT paid the same rates as other AT&T customers. COT sought no undue or unreasonable preference or advantage from AT&T. COT's claim for intentional interference with business relations was based, in part, on AT&T's willful failure to provide the services set forth in its tariff. Both the savings clause, Section 414 of the Communications Act, and Section 2.3.1 of the governing tariff, preserve COT's claims. See Nader v. Allegheny Airlines, 426 U.S. 290, 96 S. Ct. 1978 (1976).

3. Even if the tariff exclusively governed the relationship between AT&T and COT, the tariff itself authorizes COT's claims. Section 2.3.1 of the tariff states that AT&T's liability for willful misconduct is not limited by the tariff. The jury found that AT&T engaged in willful misconduct. COT's claims were entirely consistent with the tariff.

4. AT&T misstates and misapplies the filed rate doctrine. Its expansive reading of the doctrine is not supported by the doctrine's purpose or by the Communications Act. The Act requires AT&T to tariff its rates and terms affecting rates. The filed rate doctrine prohibits agreements contrary to the tariffed rates or rate-affecting terms. Neither the Act nor the filed rate doctrine prohibits gap filling agreements regarding services which are not fully addressed by the tariff and are not rate-

affecting. AT&T's marketplace behavior and admissions acknowledge this principle.

5. The Communications Act does not require that tariffs exclusively govern the relationship between two communications carriers. The Act allows two carriers, such as AT&T and COT, to order their relations by contract. Even if COT had sought to enforce contractual terms that were inconsistent with AT&T's tariff, which it did not, as a carrier COT was permitted to do so.

6. Expanding the filed rate doctrine would be inconsistent with the Telecommunications Act of 1996, which contains the most recent expression of congressional intent and completes a shift away from tariffs as an essential tool for preventing discrimination.

For all of these reasons, the judgment of the Ninth Circuit should be affirmed.

ARGUMENT

I. COMPETITOR CLAIMS ARE NOT BARRED BY THE FILED RATE DOCTRINE

Less than two years after Congress passed the Telecommunications Act of 1996 with the express purpose "to promote competition . . .", AT&T urges this Court to extend the filed rate doctrine to immunize it from claims by a competitor for anti-competitive conduct. The tariff-filing requirements of the Communications Act and the filed rate doctrine were created to regulate the relations of carriers and their customers and to protect customers from price

discrimination. They were not created to regulate, and they should not be interpreted to apply to, relations between competitors. The purpose of the filed rate doctrine, protecting customers from price discrimination, is not achieved by extending the doctrine to competitor claims.

Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156, 43 S. Ct. 47 (1922), considered the interplay between the filed rate doctrine and antitrust law. In Keogh, the Court held that antitrust claims for an alleged conspiracy by eight railroads to set higher rates were barred by the filed rate doctrine. The doctrine applied because (1) the plaintiff shippers had alternative means of redress, (2) the goal of uniform rates would be undermined by allowing such claims, and (3) the Court would otherwise be required to speculate as to the appropriate rate, an analysis better left to the ICC. However, the plaintiffs in Keogh were not the defendants' competitors.

Since Keogh, court decisions applying the filed rate doctrine have drawn a sharp distinction between consumer actions challenging rates and actions brought by actual or potential competitors for anti-competitive activity even when those claims challenge rates.[4]

In City of Kirkwood v. Union Electric Co., 671 F.2d 1173, 1176-79 (8th Cir. 1982), cert. denied, 459 U.S. 1170 (1983), the Eighth Circuit refused to extend the filed rate

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[4] An informative discussion of the distinction, as it relates to antitrust claims, may be found in P. Areeda & H. Hovenkamp, Antitrust Law § 227.2c (Supp. 1997).

doctrine to bar claims by competitors. The City of Kirkwood bought electric power from Union Electric and sold it to retail customers. Union Electric also sold power to retail customers as with COT in this case. The City of Kirkwood was thus a customer as well as a competitor of the carrier. It sued, under antitrust laws, claiming a price squeeze. The Eighth Circuit soundly rejected application of the filed rate doctrine to competitor claims:

> The filed-rate doctrine does not preclude antitrust liability in the case at bar. An award of antitrust damages for a price squeeze would not conflict with the doctrine's purpose, which is to ensure rate uniformity by confining the authority to oversee the reasonableness of rates to a single regulatory agency. . . .

City Kirkwood, 671 F.2d at 1179 (citation omitted).

The filed rate doctrine was created to protect customers, not to preclude complaints by competitors. As stated in City of Kirkwood:

> The Third Circuit noted in Essential Communications Systems, Inc. v. American Telephone & Telegraph Co., 610 F.2d 1114, 1121 (3rd Cir. 1979) that the doctrine was created to protect customers, not competitors. "[T]he filed tariff rule has little or nothing to do with AT&T's duties under the antitrust laws toward its competitors...; competitors are not the intended

> beneficiaries of that rule of public utility regulation." See also Litton Systems, Inc. v. American Telephone & Telegraph Co., 487 F. Supp. 942, 951 (S.D.N.Y. 1980). Kirkwood alleges that it has been injured as a competitor, not as a customer, though it stands in both relations to [Union Electric Company]. A rule formulated to ensure uniformity of rates as between customers should not give an unfair advantage to a utility in its dealings with competitors.

671 F.2d at 1179.

The Third Circuit likewise has refused to extend application of the filed rate doctrine to competitor claims. In Essential Communications Systems, Inc. v. American Tel. & Tel. Co., 610 F.2d 1114 (3rd Cir. 1979), the court analyzed application of the filed rate doctrine in the telecommunications field. The court first addressed the regulatory differences between the telecommunications industry and the railroad industry:

> The [Communications] Act does not impose on the telecommunications industry the kind of comprehensive regulation which, after 1920, the ICC exercised over the railroads. In addition, Section 414, the savings clause which preserves common law remedies and a specific anti-trust exemption for mergers suggest that no exemption was intended by Congress.

610 F.2d at 1120.

With this background the Third Circuit distinguished Keogh:

> AT&T's primary obligation under the 1934 Act is to adhere, in its dealings with customers, to its filed rates. That primary obligation is the heart of public utility regulation, because if carriers were free to depart from filed rates, the prohibition against discrimination among customers could be evaded. However, the filed rate rule has little or nothing to do with AT&T's duties under the antitrust laws toward its competitors in the equipment supply business; competitors are not the intended beneficiaries of that rule of public utility regulation.

610 F.2d at 1121 (emphasis supplied). See also In re Lower Lake Erie Iron Ore Antitrust Litigation, 998 F.2d 1144, 1161 (3rd Cir. 1993), cert. denied 510 U.S. 1091 (1994) ("We have held that Keogh does not apply to claims of competitors.").

In addition to the Eighth and Third Circuits, the Second and Ninth Circuits have refused to apply the filed rate doctrine to block claims brought by competitors. City of Groton v. Connecticut Light & Power Co., 662 F.2d 921, 929 (2nd Cir. 1981) (cities' claims for price squeeze and delayed offering not barred by Keogh doctrine because it impacts competitors not customers); Columbia Steel

Casting Co., Inc. v. Portland General Electric Co., 103 F.3d 1446, 1465 (9th Cir. 1996), as amended on denial of rehearing, 111 F.3d 1427 (1997), petition for cert. filed, 66 U.S.L.W. 3085 (U.S. Jul. 2, 1997) (No. 97-49) (Keogh will not be "overextended to allow a blockade of a competitor to escape scrutiny"); Cost Management Services, Inc. v. Washington Natural Gas, 99 F.3d 937, 945 (9th Cir. 1996) ("the weight of authority, and the better-reasoned authority, supports [the] argument that Keogh simply does not apply to . . . rate-related suits brought by competitors, as opposed to customers, of regulated entities").

Without expressly recognizing the distinction between consumer and competitor claims, the Seventh Circuit has declined to apply the doctrine to suits by competitors. See, e.g., MCI Communications Corp. v. American Tel. and Tel. Co., 708 F.2d 1081, 1104 (7th Cir.), cert. denied, 464 U.S. 891 (1983) (FCC's regulatory authority did not preclude application of Sherman Act to claims arising from delay, interconnection problems, improper installation and improper maintenance); City of Mishawaka, Ind. v. Indiana & Michigan Elec. Co., 560 F.2d 1314, 1318-21 (7th Cir. 1977), cert. denied, 436 U.S. 922 (1978) (denying immunity for price squeeze claim by competitor/customer arising out of relationship between electric utility's filed wholesale and retail rates).

District courts have followed suit.[5]

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[5] Frontier Enterprises, Inc. v. Amador Stage Lines, Inc., 624 F. Supp. 137, 142-143 (E.D. Cal. 1985); Capital Freight Services, Inc. v. Trailer Marine Transport Corp., 704 F. Supp. 1190, 1195 (S.D.N.Y. 1988).

The Sixth Circuit alone has applied the filed rate doctrine to some, but not all, competitor claims. Pinney Dock and Transport Co. v. Penn. Cent. Corp., 838 F.2d 1445 (6th Cir.) cert. denied, 488 U.S. 880 (1988). In Pinney Dock, a shipper alleged that another shipper committed anti-trust violations by conduct principally relating to rates and charges. Although the court "recognize[d] that the anti-discrimination arguments behind the Keogh doctrine lose their force in competitor lawsuits . . .", it refused to allow the claims as they related to rates and charges. 838 F.2d at 1457. Significantly, the Sixth Circuit remanded Pinney Dock to allow the plaintiff an opportunity to amend to assert claims for conduct unrelated to rates. Id. at 1458.

In Pinney Dock, the Sixth Circuit relied upon State of Georgia v. Pennsylvania R.R. Co., 324 U.S. 439, 65 S. Ct. 716 (1945), reh. denied, 324 U.S. 990 (1945), in which the State of Georgia brought an action against railroads for price fixing. The State sued on behalf of its citizens, customers of the railroads, and on its own behalf as the owner of a railroad. As pointed out by subsequent courts,[6] the Sixth Circuit's reliance on Georgia v. Pennsylvania

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See also Cooperative Communications v. AT&T, infra, 867 F. Supp. at 1518-19 (filed rate doctrine does not apply where competitor sues AT&T for state tort and statutory claims).

[6] In re Lower Lake Erie Ore Antitrust Litigation, 998 F.2d at 1161, n.6; Cost Management Services v. Washington Nat. Gas, 99 F.3d at 946-48; and Capital Freight Serv. v. Trailer Marine Transport, 704 F. Supp. at 1195.

R.R. Co. is curious. First, although the State sued as a proprietor, the Supreme Court viewed this allegation "merely as a 'makeweight'". 324 U.S. at 450. Second, although this Court rejected the State's claim for damages (based presumably on injuries to the carriers' customers), it allowed the State to proceed on its claim to enjoin price fixing. Id. at 453. Finally, for purposes of this case, Georgia v. Pennsylvania R.R. Co. is distinguishable because the conduct complained of related solely to rates.

Not once in its opening brief does AT&T mention that it was a competitor of COT. Anxious to portray this as a case of simple breach of contract or negligence, AT&T simply avoids the fact that COT and AT&T were competitors.

COT, for its part, has consistently highlighted its competitive relationship with AT&T.[7] The evidence supported COT's allegations. For example COT's President, Gordon Rood, testified:

> "Q. . . . Did you anticipate, as part of your target group of customers, when you

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[7] In its amended and supplemental complaint, COT alleged: "AT&T itself acts as a reseller in competition with plaintiff and other resellers by seeking out plaintiff's existing and prospective customers for itself." J.A. 20.

In the pretrial order, COT contended: "AT&T provided a lower level of services . . . to COT than COT was originally provided under its Phase II and Phase VI Agreements than AT&T provided for itself and commercial customers in competition with plaintiff." J.A. 41.

> went out on SDN, to resell AT&T's PRO WATS customers?
>
> "A. Absolutely.
>
> "Q. . . . And what was the reason that you thought you could get those customers?
>
> "A. Well, number one, price alone. AT&T service, we were - - we could offer AT&T customers what we considered a better AT&T service, the best service they offered, and we could offer it at rates probably 22 to 25 percent below what they were paying on PRO WATS or WATS." ER 386-87.

AT&T representatives confirmed the competitive relationship (ER 326, 713-14, 991-992, 1228, 1306, 1381-83, 1579, 1585-86, 1591, 2309-10, 2687, 3317), and AT&T witnesses also acknowledged that it was the resellers' ability to draw away AT&T's PRO-WATS customers that sparked AT&T's decision to put resellers out of business. J.A. 54-58; 62-64; ER 1202-03, 1211, 1222-23, 1231, 1237, 1245.

COT established to the jury that AT&T set out to eliminate it as a competitor by intentionally interfering with COT's relationships with its customers. The rationale underlying the filed rate doctrine is inapplicable to competitor claims.

II. CARRIER TARIFFS DO NOT PRECLUDE OR PREEMPT INTENTIONAL TORT CLAIMS THAT ARISE UNDER STATE LAW

A. The Filed Rate Doctrine Does Not Bar Intentional Tort Claims That Do Not Seek to Enforce Discriminatory Rates

This Court created the filed rate doctrine on the premise that a statute would not be construed to take away a pre-existing common law right "unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory." Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 437, 27 S. Ct. 350 (1907). The common law right to recover from a carrier for its willful misconduct pre-dates the Communications Act. This Court established over a century ago that carriers are prohibited from limiting their liability by tariff for claims based on willful misconduct. Primrose v. Western Union Tel. Co., 154 U.S. 1, 14 S. Ct. 1098 (1894).

To hold that COT's intentional tort claim is barred by the filed rate doctrine requires a conclusion that allowing the claim would render the Communications Act nugatory. In Abilene Cotton and subsequent decisions (including those cited by AT&T) the Court relied upon statutory prohibitions of undue preferences and unreasonable discrimination to bar common law claims seeking special

rates, or additional services that would have the effect of creating special rates.

COT's recovery for intentional interference with business relations, based on anti-competitive conduct that included (but was not limited to) AT&T's deliberate failure to provide the services set forth in its tariff, did not create the sort of preference or discrimination that this Court's prior decisions have sought to prevent. COT did not recover for being denied special privileges. It recovered because AT&T created "roadblocks" to COT's business, in order to eliminate a competitor. Upholding COT's intentional tort claim would have no effect upon the policy against preferences and discrimination that gave rise to the filed rate doctrine, much less render nugatory the statutory scheme.

An intentional tort claim is barred by the filed rate doctrine *only* where the claim would require a court to either enforce a discriminatory rate or assess the reasonableness of a proposed rate. Claims that do neither do not "affect" rates within the meaning of the Communications Act and therefore are not barred by the doctrine. Thus, many courts have held that claims against carriers for intentional torts, antitrust violations, and other anti-competitive conduct are outside the scope of the filed rate doctrine. See Columbia Steel Casting Co. v. Portland General Elec. Company, 103 F.3d 1446 (9th Cir. 1996), as amended on denial of rehearing, 111 F.3d 1427 (1997), petition for cert. filed, 66 U.S.L.W. 3085 (U.S. Jul. 2, 1997)(No. 97-49) (filed rate doctrine inapplicable to customer's claim against utility for Sherman Act violation, based on utility's refusal to wheel another utility's

electricity to customer's plant); In re Lower Lake Erie Iron Ore Antitrust Litigation, 998 F.2d 1144, 1159 (3rd Cir. 1993), cert. denied, 510 U.S. 1091 (1994) (holding Keogh does not preclude liability based on non-rate anticompetitive activity); Pacific S.S. Co. v. Cackette, 8 F.2d 259, 261 (9th Cir. 1925), cert. denied, 269 U.S. 586 (1926) (assault claim by steamship passenger not barred by tariff requirement that it be presented within 10 days after landing; notice of such claim has "no perceptible relation to rates and charges for transportation"); Fax Telecommunicaciones v. AT&T, 952 F. Supp. 946 (E.D.N.Y. 1996) (doctrine did not bar claim alleging contract to install pipe for dedicated service to operator of calling center; enforcement of contract would neither require court to assess reasonableness of rates nor discriminate in pricing); Cooperative Communications, Inc. v. AT&T Corp., 867 F. Supp. 1511 (D. Utah 1994) (doctrine did not bar claims for intentional interference with prospective economic relations and business disparagement; allowing claims would not result in discrimination); Gelb v. American Tel. & Tel. Co., 813 F. Supp 1022 (S.D.N.Y. 1993) (doctrine did not bar action by holders of calling cards alleging carrier concealed costs of using cards, although carrier had filed tariff specifying its charges for card use).

On the other hand, Marco Supply Co., Inc. v. AT&T Communications, Inc., 875 F.2d 434 (4th Cir. 1989) is typical of cases that would have required enforcement of a discriminatory rate. Marco Supply contracted with AT&T based on quotations of certain rates, which were substantially less than the amounts AT&T had filed in its tariffs. The trial court dismissed Marco Supply's claims for

breach of contract and willful misrepresentation based on the filed rate doctrine, and the Fourth Circuit affirmed.

The intentional tort claim in Marco Supply ran afoul of the filed rate doctrine because allowing the claim would have entitled the plaintiff to a lower rate than that set forth in AT&T's tariff and charged to other customers.[8]

By contrast, in the present case COT's claims had nothing to do with a misquoted rate, a misrepresentation as to rates, or a scheme to submit fraudulently inflated rates to the FCC. Nor did COT seek to impose an obligation on AT&T to provide premium service (tariffed at a premium rate) at the same rate as a standard service (tariffed at a standard rate). Compare Louisville & Nashville R. Co. v. Maxwell, 237 U.S. 94, 35 S. Ct. 494 (1915); Western Union Telegraph Co. v. Esteve Bros. & Co., 256 U.S. 566, 41 S. Ct. 584 (1921).

Here, COT paid the same rates as AT&T's other customers for SDN services. While AT&T provided those services to its non-reseller customers, AT&T provided COT and other resellers with inferior service designed to be so defective as to drive resellers out of business. AT&T's

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[8] Similar claims were barred in Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17 (2nd Cir. 1994); Taffet v. Southern Co., 967 F.2d 1483 (11th Cir.) (en banc), cert. denied, 506 U.S. 1021 (1992); and H.J. Inc. v. Northwestern Bell Telephone Co., 954 F.2d 485 (8th Cir.), cert. denied, 504 U.S. 957 (1992). See also Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 106 S. Ct. 1922 (1986) (holding that filed rate doctrine barred claim for alleged conspiracy to submit fraudulently inflated rates to regulating agency).

wrongdoing had nothing to do with rates, and to conclude that the filed rate doctrine bars the intentional tort claims at issue here would radically expand the scope of the doctrine.

B. Intentional Tort Claims Are Preserved by the Savings Clause of the Communications Act

Congress did not intend the Communications Act to preempt or bar all common law claims. To the contrary, the right to bring such claims is specifically preserved by the savings clause of the Act, 47 U.S.C. § 414 (COT Brief Appendix, hereafter "COT Br. App." 7a):

> Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

In Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 96 S. Ct. 1978 (1976), a unanimous court interpreted a virtually identical clause as preserving a passenger's common law claim for fraud based on an airline's failure to disclose its overbooking practices. 426 U.S. at 298-300. The Court found that a common law fraud action and the Aviation Act, not being "absolutely inconsistent", could co-exist as "contemplated by § 1106 [of the Aviation Act, 49 U.S.C. § 1506]." On the basis of Section 414 and Nader, courts have repeatedly held that common law claims against carriers are not preempted by the Communications Act. See, e.g., In re Long Distance Telecommunications Litigation, 831 F.2d 627, 633-34 (6th Cir. 1987)(holding

state law claims for fraud and deceit, based on carrier's failure to notify customers of practice of charging for uncompleted calls, not preempted by Communications Act); Allarcom Pay Television, Ltd. v. General Instrument Corp., 69 F.3d 381, 386 (9th Cir. 1995) (per Brunetti, J.) ("obligations imposed under state law causes of action for unfair competition, interference with contract, and interference with prospective economic advantage are in addition to [Communications Act] obligations"); Cooperative Communications, Inc. v. AT&T Corp., 867 F. Supp. 1511, 1516 (D. Utah 1994) ("inclusion of the savings clause clearly indicates Congress' intent that independent state law causes of action, such as interference with contract or unfair competition, not be subsumed by the Act, but remain as separate causes of action"); Financial Planning Institute, Inc. v. American Tel. and Tel. Co., 788 F. Supp. 75, 77 (D. Mass. 1992) (holding breach of contract claim, based on AT&T's failure to accurately record length of "800" calls, not preempted by Communications Act).

Under the principles stated in Nader, claims that are not "absolutely inconsistent" with the intended effect of the Communications Act are preserved. COT's common law tort claim for intentional interference with business relations is not at all inconsistent with the Communications Act's statutory scheme. The claim does not seek to enforce a special rate, or an agreement to provide extra services at the tariffed rate. Holding that the claim is nevertheless barred would be inconsistent with the Act and would expand the filed rate doctrine beyond the scope defined in this Court's prior decisions.

C. COT Sought No Undue or Unreasonable Preference or Advantage from AT&T

AT&T argues that COT's claims would obligate it to provide faster provisioning than required by the tariff and billing services that were not required by the tariff. This argument mischaracterizes COT's claims.

The tariff provides as follows with respect to provisioning:

> "The Company will make every reasonable effort to assure that the offering ordered is furnished on the due date. However, in some cases a delay in the installation may be unavoidable. If an order is delayed beyond its due date for more than 45 cumulative calendar days and such delay is not requested or caused by the Customer, the Customer may cancel the order without penalty or payment of non-recurring charges."

AT&T Br. App. 20a.

The jury's verdict neither imposed obligations on AT&T with respect to provisioning that were different from those set forth in this tariff provision, nor granted COT an "undue preference." COT did not prove only that AT&T failed to provision orders by the due date, or even within 45

calendar days of the due date.[9] Rather, COT proved that instead of making "every reasonable effort" to assure provisioning on the due date, as its tariff required, AT&T intentionally delayed the provisioning process to drive COT and other resellers out of business. ER 458, 1277.

With respect to billing services, AT&T contends that the following tariff provision exclusively governed its obligations:

> "The company will not allocate the usage of a Custom Network Service or the charges for such usage and is not responsible for the way the Customer may allocate usage or charges among multiple Users, except when a Customer subscribes to Custom Software Defined Network Service Location Account Billing Option . . . .

AT&T Br. App. 24a.

Again, COT did not seek service from AT&T that was inconsistent with this tariff provision. One aspect of COT's claim with respect to billing was that AT&T billed COT through the Custom Software Defined Network Service Location Account Billing Option ("LABO"), even

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[9] In fact, COT proved that within three months after COT's first account had been placed on SDN, AT&T suspended provisioning entirely for a two month period (ER 458, 529-30, 1763-64, 2556-57), and that by that time AT&T was taking an average of over six months to install a customer. ER 458-59, 516, 794.

though COT had not subscribed to that option.[10] COT also proved that AT&T's billings were grossly inaccurate. ER 471, 968, 1709, 1754. COT presented testimony that AT&T randomly applied debits, misapplied credits, and either ignored or misapplied discounts. ER 481-86, 1754, 1755, 2640, 2669, 2672-73, 4171. COT also proved that it was devastated by a loss of customers due to "suppressed billing." ER 488, 736-41, 1573, 1861-62, 4313, 4645.[11] Requiring AT&T to provide accurate and timely bills does not impose an obligation on AT&T that is at odds with the tariff or confer an undue or unreasonable preference on COT.[12]

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[10] LABO was not an appropriate billing option for a reseller such as COT. ER 412-15, 4399. Use of LABO caused 100% of the SDN discounts to be allocated to COT's customers. ER 1762, 2600-01. Thus, from the inception of its SDN contract through December 1990, when AT&T finally admitted that it had incorrectly placed COT on LABO (ER 1760-61, 4201-02), COT received virtually no income from its share of SDN discounts. ER 468-69, 471, 968, 1709, 1754.

[11] Suppressed billing occurs when a location is on the SDN network but does not have a "billing guide" in place to match its phone usage billing record. ER 869. The billing system has nowhere to register calls and they are lumped into an "unbilled" toll group until the billing guide is set up. ER 488-89, 502, 868-69, 1901. Once the guide is set up these calls are finally billed. ER 488-89, 1925-28. COT's customers became irate when they were billed for calls placed up to a year earlier. ER 488, 517, 1576, 4263, 4308.

[12] AT&T implies that the jury's failure to award the termination charges that AT&T sought by counterclaim resulted in an undue preference to COT. The trial court instructed the jury that the tariff permitted COT to terminate without penalty if the termination was due to AT&T's provisioning delays and billing problems. ER 3364. AT&T did not

The evidence at trial contradicts AT&T's argument that COT was seeking better or faster services than the tariff provides.

III. THE TARIFF ITSELF ALLOWS RECOVERY FOR WILLFUL MISCONDUCT

Even if, as AT&T argues, the tariff exclusively governed the parties' relationship, the relief awarded to COT was entirely consistent with the tariff. Section 2.3.1 of the tariff states that AT&T's liability for willful misconduct is not limited by the tariff. AT&T Br. App. 10a.

The jury found that AT&T engaged in willful misconduct. The relief awarded to COT was proper even under AT&T's broad reading of the filed rate doctrine.[13]

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take exception to that instruction. Thus, AT&T did not preserve the argument that a failure to award termination charges would unduly prefer COT. AT&T's counterclaim for unpaid charges also failed in the face of evidence that roughly $130,000 of unpaid toll resulted from AT&T's incorrect billings (ER 3102), that another $68-69,000 in purported charges had no explanation (ER 3102-03), and that AT&T's billings otherwise showed wild fluctuations and flawed calculations. ER 3105-12, 4463-79.

[13] AT&T argues that it cannot be held liable for its willful misconduct because the filed rate doctrine invalidates any obligations imposed on it that were inconsistent with the tariff. As set forth above, the evidence contradicts that argument. The jury's verdict did not impose obligations on AT&T that were different from those set forth in the tariff. The argument is also contradicted by the language of the tariff,

IV. AT&T'S BROAD READING MISSTATES AND MISAPPLIES THE FILED RATE DOCTRINE

The core of AT&T's argument is that the judgment of the Ninth Circuit is inconsistent with the statutory requirement that each carrier file tariffs "showing all charges for . . . communications between the different points on its own system and showing the classifications, practices, and regulations affecting such charges." Because COT was charged the rates specified in AT&T's tariff, the argument turns entirely on a broad reading of the requirement that carriers tariff not only charges but also the "classifications, practices, and regulations *affecting such* charges."

Citing a series of Interstate Commerce Act cases dating from early in the century, AT&T claims that the filed rate doctrine applies not only to rates but "equally to . . . any of the *services* within the purview of the Act."

Following this argument to its logical conclusion, AT&T claims that a term or condition that is of value to a customer is void even if it is not inconsistent with the tariff – if, for example, it addresses an issue on which the tariff is silent. To AT&T, "the tariff describes the entirety of the

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which must "be construed against the framer [AT&T] and favorably to users . . . ." The Associated Press, 72 F.C.C. 2d 760, 764-65 (1979), quoting, Commodity News Servs., Inc., 29 F.C.C. 1205 (1960). See also United States v. I.C.C., 198 F.2d 958, 966 (D.C. Cir.), cert. denied, 344 U.S. 893 (1952).

legal relationship between the carrier and customer, and its terms 'are conclusive as to the rights of the parties.'"[14]

AT&T's reading of Section 203 is inconsistent with the text and plain meaning of the Communications Act, its own representations and arguments to this and other courts and agencies, its behavior (and that of other carriers) in the marketplace, and the applicable case law.

A. AT&T's Expansive Reading of the Filed Rate Doctrine is Unsupported by the Communications Act

The services which AT&T promised and did not supply do not affect its rates. The notion that anything that is either of value to the customer or imposes costs upon the carrier "affects" the carrier's charges defies the dictionary, common sense, and the universal experience of contracting in a market economy.

Nothing in the language of Section 203 of the Communications Act supports a broad. "field occupying" reading of the tariff-filing requirement. Congress could have required carriers to file all of their "classifications, regulations or practices,"[15] but it chose to require the filing

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[14] AT&T Petn. at 13, quoting, Atchison, T&S.F. Ry. Co. v. Robinson, 233 U.S. 173, 34 S. Ct. 556 (1914).

[15] Section 202(a) makes it unlawful for any carrier "to make *any* unjust or unreasonable discrimination in charges, practices, classifications, regulations, or services for or in connection with like communication service, directly or indirectly, by *any* means or device." (Emphasis added.)

only of "classifications, regulations or practices affecting . . . charges." Congress also could have said that the tariff regime is to supplant state law with respect to disputes between carriers and their customers,[16] but it did precisely the opposite, declaring that "[n]othing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute . . ."[17]

To "affect" means to "produce an effect on", The Oxford Dictionary and Thesaurus (1996), or to "act on; produce an effect or change in". Random House Webster's Unabridged Dictionary (2nd ed. 1997).[18] To be sure, terms and conditions of a contract can affect rates even if they do not state rates –common examples in the telecommunications industry would include clauses waiving otherwise applicable installation charges or varying standard (*i.e.*, tariffed) under-utilization charges.

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[16] Compare former ADA, 49 U.S.C. § 1305(a)(1), prohibiting the states from enforcing any law "relating to rates, routes, or services" of any air carrier.

[17] 47 U.S.C. § 414. Compare Louisiana Public Service Com'n v. F.C.C., 476 U.S. 355, 106 S. Ct. 1890 (1986), in which this Court sharply limited the FCC's right to override intrastate telecommunications depreciation schedules in light of an express provision in the Communications Act denying the FCC jurisdiction over intrastate communication service.

[18] See also Black's Law Dictionary (6th ed. 1990) (to "act upon; influence; change; enlarge or abridge"); Webster's New World College Dictionary (3rd ed. 1997) ("to have an effect on or influence; produce a change in"); Webster's Ninth New Collegiate Dictionary (1986) (to "produce an effect upon").

But it is also plain that a clause can be both material and of great value to a customer with*out* "affecting" carrier charges. Examples would include arbitration clauses, a promise that the installation schedules presented by the carrier will in fact be met, and a promise of accurate and timely billing.[19]

The plain and logical meaning of the term "rate affecting" is that there is a higher rate associated with the presence of a particular term or condition and a lower rate associated with its absence (or vice versa).[20] AT&T actually echoes this view at one point in its brief. Describing two billing options for SDN customers,[21] AT&T avers that "neither of these options is described in the tariff, *for no separate charge is imposed for either option.*" AT&T Br. at 8.

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[19] In the instant proceeding, as noted above, AT&T concedes that it did not tariff multi-location billing, a service feature that is of value to resellers. AT&T Br. at 8.

[20] This occurs in the traditional lost baggage case in which a customer seeks to recover more than the tariff allows for his luggage without having paid the tariffed charges for customers seeking a higher limit of liability. Boston & M.R. Co. v. Hooker, 233 U.S. 97, 111, 34 S. Ct. 526, 528 (1913) ("When there are two published rates, based upon difference in value, the legal rate automatically attaches to the declared or agreed value.").

[21] Under one of these options (multi-location billing or MLB), AT&T sends separate bills to each end user location. Multi-location billing is extremely valuable to resellers who do not wish to absorb the expense of preparing and sending bills.

B. AT&T's Expansive Reading of the Filed Rate Doctrine is Inconsistent with its Own Marketplace Behavior

In an amicus brief filed contemporaneously in this case, a group of large AT&T customers describe un-tariffed contracts ranging from 50 to 100 pages in length. AT&T's brief alludes to these agreements, admitting that "many features of service and many choices to be made in implementing service requests under a tariff . . . do not affect charges, . . . do not have to be specified in tariffs, and . . . are worked out by carriers and their customers. . . " AT&T Br. at 35.

But the terms and conditions in these agreements appear to cover areas such as control over carrier personnel, acceptance testing, billing/invoicing and implementation/installation schedules. Many are unquestionably of value to customers and impose costs on AT&T, belying the definition of "affecting" for which AT&T argues in this case. As set forth in the amicus brief, the provisions that AT&T places in the individualized "options" it files with the FCC invariably involve a charge, the withdrawal of such a charge, or conduct that will result in the imposition, removal or change in a charge. The provisions that AT&T does *not* tariff (i.e., file in the individualized options) do not, on their face, affect AT&T charges.

The filed rate doctrine mandates that there be strict adherence to tariffed rates and tariffed "classifications, practices, and regulations" affecting rates. The doctrine does nothing more. As AT&T concedes, it cannot and does

not reach aspects of service that need not be spelled out in the tariff. AT&T Petn. at 35.

C. AT&T's Expansive Reading of the Filed Rate Doctrine is Inconsistent with Decisions of This and Other Courts

The cases do not support AT&T's expansive reading of the filed rate doctrine. AT&T's heavy reliance on cases that directly involve tariffed rates begs the question of what must be tariffed. And the cases do not support the substantive scope with which AT&T invests the filed rate doctrine.

AT&T's evades the question of what must be tariffed. Thus, AT&T's reliance on cases that involve rates, which COT agrees must (for now) be tariffed, is misplaced. These cases include MCI Telecommunications Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 229-31, 114 S. Ct. 2223 (1994); Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 128, 110 S. Ct. 2759 (1990), and Keogh, 260 U.S. at 163 (1922).[22]

The filed rate doctrine cases fall into distinct categories that are inapposite here. One category involves

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[22] An example of AT&T's confusing of the issues is its assertion that the filed rate doctrine "operates as a strict rule against use of 'parol' evidence and alleged side agreements . . . ." AT&T Petn. at 25. That assertion might be relevant if COT were seeking to contradict tariffed rates or "rate affecting" provisions, but the issue here concerns matters outside the scope of the tariffing requirement.

departures from the explicit terms of a tariff through mistaken rate quotations or secret deals for non-tariffed rates. See, e.g., Louisville & Nashville R. Co. v. Maxwell, 237 U.S. 94, 97, 35 S. Ct. 494 (1915) (railroad passenger erroneously charged $49.50 for trip when the tariffed rate was $78.65); Western Union Telegraph Co. v. Esteve Bros. & Co., 256 U.S. 566, 141 S. Ct. 584 (1921) (telegraph company not liable for damages stemming from transmission error where user failed to use more expensive service with greater accuracy and increased liability); Boston & Maine R.R. v. Hooker, 233 U.S. 97, 34 S. Ct. 526 (1914) (railroad passenger's recovery under breach of contract action for damaged baggage limited by tariff terms even if passenger was unaware of tariff terms).

A second category concerns agency interpretations of, and policies regarding, the tariffs filed by companies that they regulate. See, e.g., I.C.C. v. Transcon Lines, 513 U.S. 138, 115 S. Ct. 689 (1995); MCI v. American Tel. & Tel. Co., 512 U.S. 218, 114 S. Ct. 2223 (1994); Reiter v. Cooper, 507 U.S. 258, 113 S. Ct. 1213 (1993). These cases, too, are inapposite, because the claims here were raised under state law, and neither the FCC nor its policies played any role in the proceedings.

The filed rate doctrine requires adherence to the terms of the rate schedules that must be filed under the statute. It is not an aid in determining the threshold issue of what must be tariffed, but rather a rule of construction mandating strict adherence to the statutorily-mandated terms of filed rates and foreclosing certain equitable defenses that might otherwise be raised. See Maislin, 497 U.S. at 128 ("filed rate doctrine . . . follows from the

requirement that only filed rates be collected, . . . the requirement that rates not be discriminatory, . . . and the requirement . . . that carriers adopt reasonable rates and practices.").

What the filed rate doctrine is *not* is as important as what it is. This Court recently rejected the suggestion that the filed rate doctrine trumps all other aspects of the regulatory scheme:

> Respondents contend that the so-called 'filed rate doctrine' gives them absolute entitlement to judgment on their undercharge claims, without defense or counterclaim. We disagree. The filed doctrine rate embodies the principle that a shipper cannot avoid payment of the tariff rate by invoking common-law claims and defenses such as ignorance, estoppel, or prior agreement to a different rate."[23]

The fact that AT&T's arguments to this Court contradict its arguments elsewhere and its conduct has important implications for a policy that would mandate unyielding and broad application of the filed rate doctrine. This Court (and others) have always recognized that

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[23] Reiter, 507 U.S. at 265. See also I.C.C. v. Transcon Lines, 513 U.S. at 147 ("Carriers must comply with the comprehensive scheme provided by the statute . . . and their failure to do so may justify departure from the filed rate."); Maislin, 497 U.S. at 126 (filed rates, under certain circumstances, can be "suspended or set aside").

stringent application of the filed rate doctrine yields "harsh" consequences for the customers who are victims of misrepresentations by carriers, and would otherwise be entitled to rely upon the promise of those carriers to receive the benefits of their good faith agreements. The admittedly unjust enrichment of carriers has been justified on policy grounds – the theory is that customers in general benefit because carriers are prevented from discriminating in favor of preferred customers by entering into "side deals."

In the present case this end is hard to see. It is difficult to conceive how AT&T customers will be disfavored if COT is permitted to recover, even if COT's status as a competitor of AT&T is disregarded. The nature of the contractual commitments that underlie this case is instructive. AT&T did not commit to extend "special treatment" to COT. The obligations that it undertook, and that it is now seeking to avoid, were to provide accurate and timely bills and to make reasonable efforts to install circuits for the services in question. The import of AT&T's argument is that customers should be required to pay extra for accurate or timely bills, or for reasonable efforts to install circuits. Outside of the world of common carriers those arguments would be dismissed out of hand.

In light of the language of the statute, AT&T's implicit argument that a tariffed term or condition "trumps" an agreement with a customer in areas that are *not* rate-affecting (and therefore do not have to be tariffed) is untenable, as is its related argument that a contract cannot be referred to interpret, explain or "fill in" a tariff in areas where the tariff is silent, incomplete or ambiguous.

V. THE COMMUNICATIONS ACT DOES NOT REQUIRE THAT TARIFFS GOVERN RELATIONS BETWEEN COMMUNICATIONS CARRIERS

The Communications Act permits carriers to order their relations with other carriers by contract. Tariffs may supplement such contracts as incorporated contract terms, but they do not govern the carrier-to-carrier relationship to the exclusion of contracts.

COT and AT&T are both carriers within the meaning of the Communications Act.[24] Section 211 of the Act (COT Br. App., 1a) authorizes carriers to enter into contracts with one another, and envisions that their relationships will be governed by their contracts as opposed to tariffed rates. See Bell Telephone Company of Pennsylvania v. F.C.C., 503 F.2d 1250 (3rd Cir. 1974), cert. denied, 422 U.S. 1026, reh. denied, 423 U.S. 886 (1975).

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[24] See 47 U.S.C. § 153(10) (the term "'common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio. . .") and 47 U.S.C. § 154(44) ("The term 'telecommunications carrier' means any provider of telecommunication services, except that such term does not include aggregators of telecommunication services (as defined in section 226 of this title). COT does not meet the definition of an "aggregator" set forth in 47 U.S.C. § 226(a)(2): "The term 'aggregator' means any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services."

Bell Telephone turns on Section 211 and the statement in 47 U.S.C. § 203(c) that carriers must operate by tariff "unless otherwise provided by or under authority of [Title II of the Act]." 503 F.2d at 1276. The court noted that 47 U.S.C. § 201(b) allows regulated carriers to enter into contracts with non-regulated carriers, and that § 211(a) requires the filing of contracts between two or more regulated carriers as well as contracts between regulated and non-regulated carriers. Id. at 1277. The Third Circuit found that both sorts of contracts are within the caveat reserved by § 203(c), such that "carriers regulated by the Act may order their business relations by contract as well as by tariff." 503 F.2d at 1277. The court then concluded that the FCC had acted properly in rejecting a tariff filed by AT&T to the extent that the tariff conflicted with the terms of a contract between AT&T and another carrier.

The Third Circuit's decision in Bell Telephone is consistent with this Court's decisions in Armour Packing Co. v. United States, 209 U.S. 56, 28 S. Ct. 428 (1908), on the one hand, and United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 76 S. Ct. 373 (1956) and Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348, 76 S. Ct. 368 (1956), on the other. Armour held that special rate agreements between a shipper and a railroad were precluded by the Interstate Commerce Act, which makes no provision for the filing of such contracts. Mobile and Sierra, on the other hand, hold that individual contracts *are* enforceable under the Natural Gas Act and the Federal

Power Act, which (like the Communications Act) provide for individual contracts.[25]

AT&T's argument that its tariff exclusively governs its contractual relationship with COT is incorrect. Even if COT had sought to enforce contractual terms that were inconsistent with AT&T's tariff, which it did not, as a carrier COT would be permitted to do so.

AT&T's *ex parte* filing with the FCC concerning the effect of permissive detariffing (which AT&T supports) confirms this analysis. AT&T argued in that filing that if tariffs are optional, when a contract incorporates a tariff—as COT's did—the tariff is incorporated as a contract term, not as a tariff *per se*, and the filed rate doctrine simply does not apply.[26] The analysis applies—indeed, has always applied—to the terms and conditions of contracts between carriers, which as noted above have never had to be tariffed even when they are rate-affecting.

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[25] The decision in Bell Telephone that carrier-to-carrier contracts are permitted by the Communications Act and they cannot be abrogated by tariffs has been followed by the Second Circuit in Western Union Intern., Inc. v. F.C.C., 568 F.2d 1012, 1020 (2nd Cir. 1977), cert. denied, 436 U.S. 944 (1978), and by the District of Columbia Circuit in MCI Telecommunications Corp. v. F.C.C., 665 F.2d 1300, 1302 (D.C. Cir. 1981). See also American Broadcasting Companies, Inc. v. F.C.C., 643 F.2d 818 (D.C. Cir. 1980) (acknowledging distinction between carrier-to-customer contracts and carrier-to-carrier contracts); Global Access Ltd. v. AT&T Corp., .978 F. Supp. 1068, recon. denied, 1997 S2 784573 (S.D. Fla., Oct. 10, 1997) (No. 94-2192-CIV-GOLD).

[26] COT Br. App. 4a-6a.

VI. EXPANDING THE FILED RATE DOCTRINE WOULD BE INCONSISTENT WITH THE TELECOMMUNICATIONS ACT OF 1996

National policy, as evidenced in the Telecommunications Act, has now shifted away from tariffs as a necessary tool for preventing discrimination. Given this shift, this Court should decline to expand the filed rate doctrine. The broad reading of "affecting . . . charges" that is central to this case is judge-made, not statutory – it is a part of the "common law" of rate regulation statutes. The tariff filing requirement was designed to address the provision of certain vital services in a society that wanted their providers to be private but believed that the services in question were (whether "naturally" or otherwise) monopolies. The writers of the Communications Act, and the judges interpreting the Act, were fearful of gouging or discriminatory conduct on the part of the service providers. They sought to address this fear by requiring that rates and rate-affecting terms be filed with regulators, who would review them and allow them to take effect only if they were just, reasonable, and non-discriminatory. In return, regulated service providers were promised a fair return on their investment, and their tariffs, once approved, would become regulations with the force of law.[27]

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[27] Except in the filed rate doctrine, which is fiercely defended by the major carriers (see MCI Telecommunications Corp. v. F.C.C., No. 96-1459, D.C. Cir., Feb. 13, 1997), and certain areas where monopoly or near-monopoly continues to characterize the provision of utility

In MCI Telecommunications Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 114 S. Ct. 2223 (1994), this Court reiterated its view of the importance of rate filings. There, the Court voided the FCC's efforts to eliminate tariffs, finding that the Commission's authority to "modify" the filing requirement could not fairly be read to extend to the elimination of that requirement. According to the Court,

> The tariff filing requirement is . . . the heart of the common-carrier section of the Communications Act. In the context of the Interstate Commerce Act, which served as its model, . . . this Court has repeatedly stressed that rate filing was Congress's chosen means of preventing unreasonableness and discrimination in charges. . . As the Maislin court concluded, compliance with these provisions is 'utterly central' to the administration of the Act.
>
> . . . Rate filings are, in fact, the central characteristic of a rate-regulated industry. It is highly unlikely that Congress would leave the determination of whether an

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services (such as local exchange service in many areas),the world that underlies the tariff edifice has largely disappeared. The FCC ceased to review the tariff filings of interexchange carriers years ago, and those filings now take effect on one day's notice. Because tariffs continue to have the force of law, the result is to give carriers the unilateral right to alter their contracts.

> industry would be entirely, or even substantially, rate-regulated to agency discretion....
>
> . . . What we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist. That may be a good idea, but it was not the idea Congress enacted into law in 1934. [28]

Id. at 229-232.

Accepting the invitation implicitly extended by the Court in MCI v. AT&T, Congress enacted Section 10 of the Telecommunications Act of 1996, 47 U.S.C. § 160(a)(1). Section 10 *requires* the FCC to forbear from applying any regulation or any provision of the Communications Act to a telecommunications carrier if the Commission determines that (1) enforcement is not necessary to ensure that charges, practices, classifications or regulations by the carrier are just and reasonable, (2) enforcement is not necessary for the

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[28] In a footnote, the Court expressed the view that while eliminating the tariff filing requirement would not necessarily frustrate complaint proceedings, "we (and the FCC) are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." Id. at 231, n.4.

protection of consumers, and (3) forbearance is consistent with the public interest.

Section 10 gave the FCC the authority it needed to eliminate the tariff filing requirement, expressing in no uncertain terms Congress' desire that regulatory requirements that cannot be justified on public interest grounds not only may but must be removed.[29]

The FCC moved quickly to eliminate tariffs for certain communications services. In its Policy and Rules Concerning the Interstate Interexchange Marketplace (CC Docket No. 96-61), FCC 96-424 (released October 31, 1996), 61 Fed. Reg. 59340 (November 22, 1996), the FCC ordered nondominant interexchange carriers[30] to cancel all tariffs for interstate, domestic, interexchange services currently on file with the FCC, and prohibited nondominant interexchange carriers from filing tariffs for such services in the future. 61 Fed. Reg. at 59353.

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[29] As AT&T concedes in its brief, Section 10 of the Act encompasses the tariff filing requirement. In fact, the 1996 Act was a direct response to this Court's decision in MCI v. AT&T, and was designed to reverse that decision insofar as it limited the FCC's authority to eliminate regulatory requirements (including the tariff filing requirement) under the Communications Act as previously written.

[30] Previously on October 23, 1995, the FCC issued an order granting AT&T's motion to be reclassified as a nondominant carrier. Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, FCC 95-427 (rel. October 23, 1995), recon. pending.

Among the public interest benefits identified by the FCC in support of detariffing were "eliminating the possible invocation of the filed rate doctrine by nondominant interexchange carriers, and establishing market conditions that more closely resemble an unregulated environment." 61 Fed. Reg. at 59349.

The importance of the recent actions of Congress and the FCC to this case lies in their implications for the "common law" of the Communications Act. If the tariff filing requirement is not the "heart" of the Act, then the savings clause in Section 414 (COT Br. App. 7a) is not a dead letter, and carriers should be subject to common law liability except where the Act clearly requires otherwise. The filed rate doctrine may not disappear until the FCC's efforts to eliminate it take effect, but a broad reading of the doctrine in the manner of the dissent below is no longer sustainable.

When national policy shifts through Acts of Congress, this Court has revisited prior doctrines to bring them into harmony with national policy. For example, the Wilko doctrine held that pre-dispute agreements to arbitrate securities claims were void because they violated national policy embedded in the Securities Act of 1933. Wilko v. Swan, 346 U.S. 427, 74 S. Ct. 182 (1953). But national policy shifted strongly in favor of arbitration when the Arbitration Act, 9 U.S.C. § 1 et seq., was passed by Congress, and the Court overruled Wilko. Rodriguez de Quijas v. Shearson/American Exp., Inc., 490 U.S. 477, 479, 109 S. Ct. 1917 (1989).

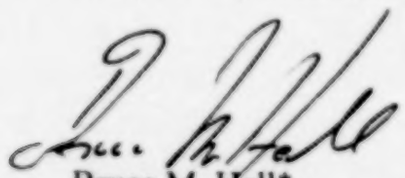
Similarly, the Sinclair doctrine held that the anti-injunction provisions of the Norris-LaGuardia Act precluded federal courts from enjoining a strike even though the parties had entered a no-strike agreement calling for binding arbitration. Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 82 S. Ct. 1328 (1962). But in Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 238, 90 S. Ct. 1583 (1970), the Court reexamined the Sinclair doctrine on the grounds that it departed from the "congressional policy to promote peaceful settlement of labor disputes through arbitration". Id. at 241. The Court added that in light of events subsequent to Sinclair, "it has become clear that the Sinclair decision does not further but rather frustrates realization of an important goal of our national labor policy." Id.

In both of the foregoing cases, a shift in national policy led the Court to revisit prior decisions. National policy with respect to telecommunications law has now shifted away from tariffing as an inevitable and essential tool for the prevention of unreasonable discrimination. Given this shift, this Court should decline to expand the filed rate doctrine to include claims of competitors for interference and other anti-competitive conduct.

CONCLUSION

For the foregoing reasons, COT respectfully requests that the judgment of the Ninth Circuit be affirmed.

Respectfully submitted,



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TITLE II - COMMON CARRIERS

Part I - Common Carrier Regulation

Sec. 211 [47 U.S.C. 211] Contracts of Carriers; Filing with Commission

(a) Every carrier subject to this chapter shall file with the Commission copies of all contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of this chapter, in relation to any traffic affected by the provisions of this chapter to which it may be a party.

(b) The Commission shall have authority to require the filing of any other contracts of any carrier, and shall also have authority to exempt any carrier from submitting copies of such minor contracts as the Commission may determine.

[Under cover letter dated July 17, 1996 from Judith D. Argentieri, AT&T Government Affairs Director, to William F. Caton, Acting Secretary, Federal Communications Commission]

AT&T Ex Parte Presentation -- CC Docket No. 96-61

Permissive Detariffing And The Filed Rate Doctrine

Although a majority of commenters in CC Docket No. 96-61 support permissive detariffing, a few commenters continue to support mandatory detariffing,[1] at least for negotiated service arrangements, based on the purported concern that unless detariffing were mandatory, carriers could continue to file tariffs and invoke the filed rate doctrine to make unilateral changes to carrier-customer deals. A brief analysis of the filed rate doctrine, however, makes plain that this "problem" is chimerical. The filed rate doctrine is a product of a specific legal regime -- a

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[1] As explained in its comments in this docket, and in its July 10, 1996 ex parte, AT&T does not believe that the Commission may lawfully order mandatory detariffing, for two reasons. First, the Commission's authority under Section 10 permits it to refrain from requiring tariffs, but does not extend to prohibiting the filing of tariffs. Second, because the record establishes that mandatory detariffing would impose enormous costs on carriers and customers, particularly with respect to casual calling and services provided to residential and small business customers, with no countervailing benefits that could not be achieved through permissive detariffing, a mandatory detariffing rule would not be "in the public interest."

regime of mandatory tariffs -- not a talisman that trumps all contractual agreements. As explained below, under a permissive detariffing regime, a written contract could specify that it is controlling over subsequent tariff filings, and the customer could then assert the contract as a defense to any claim based on such filed tariffs.

The filed rate doctrine was the product of two interrelated subsections of the Interstate Commerce Act (ICA). First, the ICA required that carriers make public filings disclosing their rates. Second, and correlatively, carriers were prohibited from charging or collecting any rates other than filed rates. These two requirements served as the model for Sections 203(a) and (c) of the Communications Act.[2] The purposes of the tariff requirements of both the ICA and the Communications Act were "to render rates definite and certain, and to prevent discrimination and other abuses"[3] by ensuring that all customers paid the same charges -- the filed rate -- for the same service. In numerous decisions, the Supreme Court construed these requirements to mean that "the rate of the carrier duly filed is the only lawful rate."[4]

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[2] MCI v. AT&T, 114 S. Ct. 2223, 2231 (1994).

[3] Maislin Indus. v. Primary Steel, Inc., 497 U.S. 116, 126 (1990) (citing Arizona Grocery Co. v. Atchison T. & S.F.R.R. Co., 284 U.S. 370, 384 (1932)).

[4] E.g., id. at 127, quoting Louisville & Nashville R.R. Co. v. Maxwell, 237 U.S. 94, 97 (1915).

The Supreme Court's decisions make clear that that the filed rate doctrine necessarily derives from the requirement that all rates be filed. The sole purpose of the filed rate doctrine is to enforce a regime in which tariff filings are mandatory. As the Supreme Court explained in Maislin, allowing a carrier to charge other than filed rates would "render nugatory" the statutory requirement that all rates be filed.[5] The filed rate doctrine thus reduces to a syllogism: If a rate must be filed in order to be valid, then unfiled rates cannot be valid.

By exercising its statutory forbearance authority to adopt permissive detariffing, the Commission would eliminate the major premise of the syllogism -- the requirement that all rates be filed. Valid and enforceable rates can be established through mechanisms other than filed tariffs, such as through unfiled contracts. There is simply no basis for the assertion that the filed rate doctrine would vitiate contract rates in a permissive detariffing scheme. A carrier that had agreed to rates in an unfiled contract could no longer claim that the filed rate was the "only lawful rate."

Indeed, the courts have recognized that where the statute at issue, or the agency acting within its statutory authority, permits rates and other terms of service to be established other than through filings with the agency, the filed rate doctrine does not apply.[6] Thus, in Maislin, the

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[5] Maislin, 497 U.S. at 132.

[6] See Arkansas Louisiana Gas Company v. Hall, 453 U.S. 571 (1981) (recognizing that carrier must charge and collect the filed rate,

Supreme Court invalidated the Interstate Commerce Commission's (ICC) "Negotiated Rates" policy based on its conclusion that the ICC had no authority to abrogate the ICA's requirement that all rates be filed. Conversely, the court's opinion makes clear that the Negotiated Rates policy could have been sustained had the ICA given to the ICC the forbearance authority which Congress has now given to the Commission in Section 10.[7]

It has nevertheless been suggested that in a permissive detariffing regime, a carrier could "voluntarily" file and attempt to enforce a tariff against a customer with which the carrier had previously entered into a written agreement providing that the contractual terms would control over any inconsistent tariff provisions. This argument, which is based on the language in Section 203(c) requiring that a carrier charge and collect its filed rates, ignores the fact that the Commission's Section 10 forbearance authority extends to Section 203(c) no less than to Section 203(a). Indeed, Section 203(c) itself provides that its requirement that carriers collect their filed rates is inapplicable where "otherwise provided by or under the

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"[e]xcept when the Commission [validly] permits a waiver"). In a later proceeding in Arkansas Louisiana, the Fifth Circuit observed that the Supreme Court's decision in that case "clearly recognized that the waiver provisions of [15 U.S.C. § 717(d) authorized] the Commission to waive the usual requirements of timely filing of an alteration in a rate." Hall v. FERC, 691 F.2d 1184, 1189 (5th Cir. 1982) (quotation omitted). Accordingly, Hall v. FERC expressly noted that the filed rate doctrine would not bar exercise of FERC's waiver authority. Id.

[7] Maislin, 497 U.S. at 133-35.

authority of this Act." If the Commission were to exercise its authority under new Section 10 to forbear from enforcing Sections 203(a) and 203(c) when a carrier and a customer have entered into an unfiled written agreement, and thereby adopt permissive detariffing, a carrier could not invoke the filed rate doctrine to make unilateral changes to the terms of their deal.[8]

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[8] Permissive detariffing would operate in a manner analogous to the role of the Uniform Commercial Code in contracts for the sale of goods. Parties to such contracts may specify that the "default" provisions in the UCC do not govern their relationship, and instead may specify alternative terms. Similarly, carriers and customers may provide that any or all of the terms in the contract apply in lieu of otherwise applicable tariff provisions.

COMMUNICATIONS ACT (47 U.S.C. § 414)

Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in additional to such remedies. (June 19, 1934, c. 652, Title IV, § 414, 48 Stat. 1099.)

Supreme Court, U.S.
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No. 97-679

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP.,
Petitioner,

v.

CENTRAL OFFICE TELEPHONE, INC.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

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INTRODUCTION AND SUMMARY OF ARGUMENT

This Court granted certiorari to review the Ninth Circuit's affirmance of a judgment under Oregon state law that awarded respondent Central Office Telephone, Inc. ("COT") $1.1 million in lost profits -- and denied petitioner AT&T's counterclaim to recover unpaid tariffed charges -- on the ground that AT&T had breached alleged provisioning and billing guarantees that concededly were not "covered" by AT&T's tariff. AT&T's opening brief demonstrated that this holding is contrary to almost a century of this Court's decisions and that COT's judgment epitomizes the "rebates," "preferences," and discrimination among similarly situated customers that the filed tariff doctrine is designed to prevent. These points have now been confirmed by the briefs of COT and the Ad Hoc Users Committee, et al. ("Ad Hoc *amici*").

Preliminarily, COT acknowledges that this Court has held that a customer can avoid paying tariffed charges only if it shows that they violate the requirements of §§ 201-203 of the Communications Act, and not by asserting equitable defenses and "common law claims." COT Br. 37 (quoting *Reiter* v. *Cooper*, 507 U.S. 258, 265-66 (1993)). It was thus clearly wrong for the Ninth Circuit to affirm the trial court's denial of AT&T's motions for judgment as a matter of law on its counterclaim.

More fundamentally, as neither COT nor the Ad Hoc *amici* disputes, this Court has squarely held that filed tariff requirements are not limited to rates and that they preempt the very state law claims that COT brought: that it was entitled to expedited service not required by AT&T's tariff. *See*, *e.g.*, *Chicago & Alton R.R.* v. *Kirby*, 225 U.S. 155 (1912); *Davis* v. *Cornwell*, 264 U.S. 560 (1924). It constitutes a "rebate" and "preference" for a carrier, at no extra charge, to provide any "service not covered by the prescribed tariffs." *United States* v. *Wabash R.R.*, 321 U.S. 403, 412-13 (1944).

Moreover, contrary to COT's assertions, AT&T's "marketplace behavior" confirms that COT here imposed obligations on AT&T that COT had not paid for. When AT&T makes the billing and provisioning guarantees that COT alleges -- as AT&T does for customers who are willing to pay for them -- those guarantees are filed in tariffs that contain appropriately higher rates. *See* Appendix to this Reply Brief.

Neither COT nor the Ad Hoc *amici* has discussed *Kirby* and *Davis*, much less attempted to distinguish those decisions. However, they appear to claim (as COT did not below) that those decisions rest on statutory terms that were unique to the Interstate Commerce Act and that they are inconsistent with the terms of the Communications Act and should no longer be followed. COT's principal claims are (1) that § 203 only prohibits untariffed services if those services "affect . . . charges" and (2) that a service does not "affect charges" unless it results in differences in rates.

Both contentions are wrong. Sections 203(c)(2) and 203(c)(3) codified the Interstate Commerce Act's prohibitions against rebates and preferences in order to ensure that this Court's prior decisions would apply to § 203. Further, the narrow construction of "affect . . . charges" that COT proposes is contrary to the terms of § 203(c) and this Court's decisions.

Against this background, it is not surprising that COT's Brief is primarily devoted not to a defense of the Ninth Circuit's holding, but to a series of attempts to defend its judgment on other grounds. Part I of this Reply will demonstrate that those other grounds are not presented by this case and are erroneous. Part II will refute COT's and the Ad Hoc *amici*'s attempts to defend the Ninth Circuit's holding that the filed tariff requirements only apply to rates and rate setting.

I. THE ONLY ISSUE BEFORE THE COURT IS WHETHER THE NINTH CIRCUIT CORRECTLY HELD THAT STATUTORY FILED TARIFF REQUIREMENTS APPLY ONLY TO RATES.

COT's Brief is primarily an attempt to avoid the narrow issue before the Court. It seeks to do so both by misstating AT&T's claims and by attempting to disavow the grounds on which COT obtained its judgment. In particular, COT now attempts to recast its lawsuit as raising antitrust or other claims based on COT's status as a competitor or claims that AT&T violated its tariff. These arguments are meritless.

A. This Case Raises No Issue Involving The Rights Of Competitors.

COT's principal argument is that accepting AT&T's position that the filed tariff doctrine forecloses state law claims would "extend the filed rate doctrine to immunize [AT&T] from claims by a competitor for anti-competitive conduct." COT Br. 11. COT did not make this argument below. It is also wrong. As AT&T's Brief demonstrated (pp. 19-20 & n.17, 30-31), resellers and other competitors can claim -- and have claimed -- that they received poor or inferior services in violation of § 201's ban on unreasonable rates and practices, § 202(a)'s ban on unreasonable discrimination, § 203's ban on violation of the carrier's tariff, or (when applicable) federal antitrust laws. By requiring that claims of competitors and other customers be pursued under these federal standards (with all questions subject to the primary jurisdiction of the FCC), the filed tariff doctrine ensures that similarly-situated customers will be treated uniformly and prevents the "rebates" and "preferences" that inevitably arise if customers can maintain state law claims.

Moreover, the filed tariff requirements were enacted to

protect competition by preventing economic discrimination *among* customers who competed with one another: *e.g.*, the railroads' favoritism of large shippers. *See* S. Rep. No. 46, 49th Cong., 1st Sess., pt. I, at 188-90 (1886). Here, COT's judgment gives COT a preference over the 100 other SDN resellers who competed with COT -- and who received the same quality of service -- as well as over commercial SDN customers. Because filed tariff requirements prohibit the provision of rebates and untariffed privileges to any customer, this Court has held that these prohibitions fully apply to freight forwarders and other customers who obtain services from a carrier in order to compete with it. *Lehigh Valley R.R.* v. *United States*, 243 U.S. 444, 445-47 (1917). As the Court has held, "[t]he fact that a person tendering traffic is a competitor does not permit the railroad to discriminate against him or in his favor." *American Trucking Ass'n, Inc.* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397, 407-08 (1967) (and cases cited). Thus, AT&T's claim would not "extend" the filed tariff doctrine.

Ironically, in arguing that the filed tariff doctrine should not apply to competitors' claims under state law, COT relies on a series of federal antitrust decisions that would be inapposite even if this were an antitrust case. COT Br. 11-19. None involved a customer's claims that it was entitled to better regulated service or more favorable rates than required by the tariff. In all events, COT dismissed its federal antitrust claims before trial, and COT's assertions that AT&T attempted to drive resellers out of business (COT Br. 3-9) was not the basis for the jury verdict (and is not supported by the evidence).

B. This Case Presents No Claims Of Violations Of Tariffs Or Contracts Between Carriers.

COT also seeks to defend its judgment by contending that it was not based on the enforcement of extra-tariff promises

at all. Rather, COT now claims that it sought and obtained damages for AT&T's "deliberate failure to provide the services set forth in its tariff." COT Br. 21. This contention is startling. Throughout the proceedings in the trial court, and in the Ninth Circuit, COT successfully opposed AT&T's claim that the only issue in this case should have been whether AT&T had willfully violated its tariff. *See* Petn. 11a.

Moreover, COT took this position because there was no evidence that AT&T had violated the tariff. Indeed, COT's position in the trial court and the Ninth Circuit was that the alleged billing and provisioning guarantees were actionable precisely because they were not "covered" by the tariff.

For example, unlike other AT&T tariffs, AT&T's SDN tariff did not require that orders be installed within any particular number of days, but required only that AT&T "establish" a "due date" after each order was placed, that AT&T make "reasonable efforts" to meet that date, and that AT&T allow the customer to cancel without penalty if the due date was missed by more than 45 days. Here, there is no evidence that AT&T missed a single due date that was established after a COT order was placed, much less that it did so by more than 45 days. Similarly, AT&T's SDN tariff did not then require that calls be billed within any particular number of days, and the fact that it sometimes took "months" for a call to be billed (COT Br. 5) did not violate AT&T's tariff. Yet this was COT's principal billing claim and the sole reason now alleged for COT's termination of SDN services in 1992. ER 1942.

COT also claims that AT&T violated commitments to bill COT's customers on COT's behalf at specific rates during six months in 1990. COT Br. 4, 28 n.10. But AT&T's tariff specifically provided that AT&T would *not* allocate charges among an SDN customer's locations and that doing so was the

customer's (COT's) responsibility. *See* AT&T Br. 32-33.[1] Moreover, as COT has correctly stated to this Court, the FCC's regulations provide that any services in which a common carrier is responsible for billing its customer's customers are not common carrier communication services and may not be provided as part of a tariffed service.[2] Accordingly, AT&T's sole obligation under the SDN tariff was to send bills to the customer (COT) that would enable it to allocate charges among its locations as it saw fit -- which AT&T did by providing bills to SDN customers in one of two different formats. AT&T Br. 7-8. By contrast, the billing services that COT sought could not be provided in exchange for COT's payment of the tariffed rate. Rather, those billing services require separate contracts that impose charges *in addition* to the tariffed long distance service rates -- and there concededly was no such contract here.

COT also seeks to defend its judgment by arguing -- as it did not below -- that § 211 of the Communications Act (47 U.S.C. § 211) supports its state law claims. COT Br. 39-41. But § 211 only allows one carrier to provide service to another carrier pursuant to a written contract that is filed at the FCC. By contrast, even if COT were a "carrier," the only written "contract" was COT's written acknowledgment that its service was governed by AT&T's tariff, and that "contract" was not filed at the FCC.

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[1] For the first time in this case, COT now contends that AT&T violated its tariff by placing COT on the LABO option for which COT did not qualify. COT Br. 4. That is false. AT&T put COT on multilocation billing, but initially prepared bills that had not made the calculations that COT had directed.

[2] *See* COT's Opposition to Petition for Certiorari, p. 6 n.1 (citing *Detariffing of Billing and Collection Services*, 102 F.C.C.2d 1150, 1168 (1986); *AT&T 900 Dial-It Services and Third Party Billing and Collection Services*, 4 FCC Rcd. 3429 (Chief, Common Carrier Bur. 1989)).

Finally, in all events, the decisive fact is that this case was submitted to the jury on the ground that it could find that AT&T breached a contract and tortiously interfered with COT's business relations with its customers if AT&T willfully violated COT's extra-tariff "understanding" that, for example, orders would be provisioned in 60-90 days.[3] The willful violations of this "duty" could consist of nothing more than AT&T's willful failure to give each COT order priority over the pending and future orders of other customers -- as AT&T conceded it did. That is why the Ninth Circuit recognized that COT's judgment could be upheld only if filed tariff requirements were limited to rates and rate setting and do not preclude state law claims that a carrier had breached oral or implied guarantees of expedited provisioning and billing that are not "covered" by the tariff.

II. THE NINTH CIRCUIT MAJORITY'S HOLDING IS CONTRARY TO THE SETTLED MEANING OF § 203'S TARIFFING REQUIREMENTS.

As AT&T's opening brief demonstrated at length, the Ninth Circuit majority's holding is contrary to a line of this Court's decisions that begins with *Chicago & Alton R.R.* v. *Kirby*, 225 U.S. 155 (1912). *See also Davis* v. *Cornwell*, 264 U.S. 560 (1924). Those decisions hold that untariffed guarantees that service will be provisioned in a particular number of days constitute the "preferences" and unjust "advantages" that are prohibited by the Interstate Commerce Act's ("ICA") counterparts to § 203(c) (and § 202(a)) of the Communications Act. Yet that was COT's provisioning claim and its principal billing claim.

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[3] Contrary to COT's suggestion (Br. 21), both the trial court (ER 2477) and the Ninth Circuit (Petn. 6a) held that COT's tortious interference claim is derivative of COT's breach of contract claim. The claimed intentional interference was AT&T's breach of the alleged extra-tariff guarantees.

Neither COT nor the Ad Hoc *amici* has attempted to distinguish *Kirby* and its progeny or to defend the Ninth Circuit majority's distinction of those cases. However, they argue -- as COT did not below -- that these decisions are inconsistent with the Communications Act and contrary to AT&T's "marketplace behavior." There is no substance to these arguments.

A. *Kirby* And Its Progeny Construed Prohibitions That Were Codified In § 203 In Order To "Preserve" The Prior Interpretations.

COT's and the Ad Hoc *amici*'s main argument appears to be that *Kirby* and its progeny do not apply -- and were not intended to apply -- to § 203 of the Communications Act. They contend that § 203 prohibits untariffed service features only if those features "affect . . . charges," and they contend that a matter does not "affect . . . charges" unless it can produce differences in rate levels: *i.e.*, "that there is a higher rate associated with the presence of a particular term or condition and a lower rate associated with its absence (or vice versa)." COT Br. 33. In this regard, the Ad Hoc *amici* argue Congress used different terms in § 203 than it had in the ICA in order to assure that its prohibition on untariffed practices applied only to these matters. Ad Hoc *amici* Br. 10-11

Preliminarily, prior to the enactment of the Communications Act of 1934, carriers providing interstate telegraph and telephone services were regulated by the Interstate Commerce Commission (ICC) under the provisions of the ICA that applied to transportation. This Court had specifically applied *Kirby* and its progeny to hold that the obligations that telephone and telegraph companies incurred in exchange for the tariffed rates were exclusively federal questions and that the federal tariffing requirements preempted

both state contract and tort claims for failure to provide prompt service.[4]

Congress enacted Title II of the Communications Act of 1934 to transfer to the FCC the same regulatory authority over interstate telephone and telegraph common carriers that the ICC had theretofore exercised.[5] In particular, both the House and Senate Reports stated that many ICA provisions were "copied verbatim," but that other provisions were "simplified and clarified" and "[t]hese variances or departures from the text of the Interstate Commerce Act are made for the purpose of clarification in their application to communications, rather than as a manifestation of congressional intent to attain a different objective."[6] The Reports further provided that one reason the Communications Act adopted the ICA provisions was "to preserve the value of court and commission interpretations of that act." House Report, p. 4. For these reasons, and due to the near identity of terms (*see Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992)), this Court has held that decisions construing the ICA apply to § 203 of the Communications Act (*MCI Telecom. Corp.* v. *American Tel. & Tel. Co.*, 512 U.S. 218, 229-31 (1994)), and "across the spectrum of regulated utilities." *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577 (1981); *accord United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 481 (1932) ("settled construction" of ICA applies to other statutes whose "scope and purpose, as well as [] terms [are] closely parallel[]").

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[4] *Western Union Tel. Co.* v. *Boegli*, 251 U.S. 315, 316-17 (1920); *Postal Telegraph-Cable Co.* v. *Warren-Godwin Lumber Co.*, 251 U.S. 27 (1919).

[5] S. Rep. No. 781, 73d Cong., 2d Sess. 1-2 (1934) ("Senate Report"); H.R. Rep. No. 1850, 73d Cong., 2d Sess. 1-4 (1934) ("House Report").

[6] Senate Report, p. 2; *accord* House Report, p. 4, 5.

These principles apply with special force here. There is no material difference between the language of § 203 of the Communications Act and that of the original § 6(7) of the ICA (which is reproduced in the Appendix to this Reply).[7] And this Court has repeatedly rejected COT's claims in decisions construing the precise terms that are codified in § 203.

1. Section 203(c) Contains The Same Prohibitions That Were Construed In *Kirby* And Its Progeny.

The first error of COT and the Ad Hoc *amici* is their assumption that § 203 only prohibits untariffed "practices . . . affecting . . . charges." In addition to this prohibition, § 203 bars carriers from (1) "collect[ing] . . . different compensation . . . than . . . specified in [its tariff]" (§ 203(c)(1)), (2) "refund[ing] or remit[ting] by any means or device any portion of the charges so specified" (§ 203(c)(2)) (rebates), and (3) "extend[ing] to any person any [untariffed] *privileges* or facilities, in such communication" (§ 203(c)(3)) (emphasis added) (preferences). *See* AT&T Br. 23, 3a-4a.

These latter three prohibitions were "copied" verbatim from § 6(7) of the Interstate Commerce Act.[8] Indeed, § 6(7) did not contain § 203(c)(3)'s additional prohibition against "employ[ing] or enforc[ing] any [untariffed] classifications,

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[7] The Ad Hoc *amici* (Br. 10-11) rely on the fact that the ICA's counterpart to § 203(a) of the Communications Act required carriers to file tariffs that "contain . . . all . . . charges . . . and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such . . . charges, *or the value of the service rendered to the [customer]*," (49 U.S.C. § 6(1) (1934) (emphasis added)), whereas § 203(a) requires tariffs that show all "charges" and the "classifications, practices, and regulations affecting such charges."

[8] Senate Report, p. 4; House Report, p. 5.

regulations, or practices affecting such charges." Thus, in holding that untariffed provisioning guarantees were "preferences," *Kirby*, *Davis*, and their progeny were construing the prohibitions of § 6(7) that were codified verbatim in § 203(c)(2) and § 203(c)(3). In this regard, *Kirby* and *Davis* did not quote, construe, or in any way rely upon any of the language of § 6(1) of the ICA that was not copied verbatim into § 203(a) of the Communications Act (*see* p. 10 n.7, *supra*).

Further, *Kirby* and *Davis* were reaffirmed by this Court in a series of decisions where the only issue was the scope of the prohibition in § 6(7) that is recodified in § 203(c). In particular, the Court held that it was a violation of § 6(7) for a railroad to provide, at no extra charge, "spotting" services that were in addition to point-to-point transportation services defined in the tariff. The Court held a carrier's provision of a "service not covered" in the tariff at no extra charge constituted both a "preference" (in violation of the counterpart to § 203(c)(3)'s ban on untariffed "privilege[s]") and a "rebate" (in violation of the counterpart to § 203(c)(2)). Indeed, the Court held that, whether or not there is discrimination in violation of § 202(a)'s counterpart, "a preference or rebate [that violates § 203(c)'s terms] is the necessary result . . . where the carrier renders or pays for a service not covered by the prescribed tariff." *United States* v. *Wabash R.R.*, 321 U.S. 403, 412-13 (1944) (citing *Davis*, 264 U.S. 560); *accord United States* v. *United States Smelting, Refining & Mining Co.*, 339 U.S. 186, 194-95 (1950) ("a preference necessarily result[s] when a service is rendered 'in excess of that which the carriers are obliged to perform by their tariffs'") (citation omitted). Thus, for example, had AT&T assumed the responsibility for billing COT's customers that COT claimed, it would have been an illegal preference. *See* pp. 5-6, *supra*.

2. COT's Proposed Interpretation Of "Affecting . . . Charges" Is Contrary To The Communications Act's Terms And To This Court's Decisions.

Second, in all events, both the statutory terms and the Court's prior decisions foreclose COT's proposed narrow construction of the prohibitions against untariffed practices "affecting . . . charges." COT argues that the plain meaning of this language is that it covers only features of service that can produce differences in charges between two customers, either because an additional charge is associated with the presence of a feature or because a credit is associated with its absence. COT Br. 33. But whatever the phrase "practices . . . affecting charges" could mean in other contexts, COT's argument is foreclosed by the remaining terms of § 203(c).

Because § 203(c)(1) prohibits any differences in charges between two customers that are not specified in the effective tariff, COT's proposed construction of § 203(c)(3)'s final clause would make surplusage of § 203(c)(1). Further, COT's narrow construction of the terms would establish distinctions that are arbitrary and that defeat the Act's purposes. For example, it would create the very rate discrimination that COT concedes is prohibited, for carriers could orally promise to provide enhanced services and pay the customers their lost profits if the promise were breached.

This Court has rejected COT's proposed construction of "classifications, practices, and regulations affecting . . . charges." In *ICC* v. *Illinois Central R.R.*, 215 U.S. 452, 475-76 (1910), this Court held (in construing another provision of the ICA) that these terms applied to practices that did not increase or reduce any customer's payments but that constituted preferences. In *Nantahala Power & Light Co.* v. *Thornburg*,

476 U.S. 953 (1986), the Court held that a power allocation agreement that did not determine any "rates or rates *per se*" was one of the "classifications, practices, and regulations affecting such rates" within the statutory tariffing requirement because the allocated power was valuable and "directly affect[ed]" Nantahala's costs of obtaining power. *Id.* at 966-67. *Compare id.* at 955-61 & 966-67 *with* Federal Power Act, § 205(c), 16 U.S.C. § 824d.

B. AT&T's Positions In This Case Are Supported By Its Marketplace Behavior.

COT and the Ad Hoc *amici* also contend that AT&T's position in this case is inconsistent with positions it previously took before the FCC and with its "marketplace behavior." COT Br. 34-35; Ad Hoc *amici* Br. 16-21. However, rather than supporting COT's claims, AT&T's behavior vividly demonstrates both that COT is here seeking rebates and preferences and that adherence to *Kirby* and its progeny can affect no legitimate interest of any customer.

In suggesting otherwise, COT and the Ad Hoc *amici* point to the fact that AT&T and other long distance carriers have often responded to requests of very large telecommunications users to meet unique requirements by negotiating detailed "contracts" that (1) define the customized services that will be provided, (2) set forth the associated rates, terms, conditions, and privileges, and (3) also deal with the administrative and procedural details of service that, in other contexts, are selected by customers when they submit order forms or are worked out informally. COT and the Ad Hoc *amici* neglect to mention, however, that these customized arrangements are lawful *only if* all the rates, privileges, terms, and conditions that affect rates are also filed in tariffs that are "based upon contracts" and that are generally available to any

other customers willing and able to satisfy the tariffs' terms.[9] Thus, these "contracts" invariably require that tariffs be filed to implement these terms. Accordingly, it is irrelevant that the tables of contents of certain contracts refer to rates, privileges, and terms and conditions that affect rates. These provisions are valid and enforceable only because there is a counterpart to each in the carrier's tariff.

Most pertinently, when AT&T has in fact negotiated the kinds of service and billing guarantees that COT here claims, AT&T files tariff provisions that contain the guarantees and that specify the remedies in the event of a breach. Illustrative examples of these provisions are reproduced in the Appendix to this Reply Brief. For example, "installation guarantees" that orders will be provisioned within specified numbers of days after they are placed are tariffed features of a number of service arrangements that are based on contracts negotiated with large customers as well as other services. *See* Appendix 3a-10a. Similarly, other tariffs contain guarantees that individual calls will be billed within 60, 90, or 120 days (*see id.*, 11a-12a). Finally, although AT&T cannot assume responsibility for billing its customers' customers in a tariffed service, AT&T has entered into separate contracts to provide these unregulated billing services to customers for additional charges. *See* p. 6, *supra*.

In these regards, AT&T has also filed contract tariffs that are specifically designed to meet the needs of resellers and that both provide that service orders will be installed within 10 days (or installation fees will be waived) and that guarantee that 99% of calls will be billed within 90 days in exchange for payment of rates that are higher than those in AT&T's SDN

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[9] *MCI Telecom. Corp.* v. *FCC*, 917 F.2d 30, 38 (D.C. Cir. 1990); *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd. 5880, 5902-03 (1991).

tariff. *See* Appendix 13a. By contrast, there were no such provisions in AT&T's SDN tariff during the periods in question because AT&T was then in no position to guarantee provisioning or billing within particular intervals in exchange for the rates then contained in the tariff.[10] So contrary to COT's claim, this is a case in which COT seeks "to impose an obligation on AT&T to provide premium service (tariffed at a premium rate) at the same rate as a standard service (tariffed at a standard rate)." COT Br. 23.

Against this background, it is ironic that the Ad Hoc *amici* would express concern that acceptance of AT&T's position could jeopardize their service arrangements. The Ad Hoc *amici* do not identify a single instance in which AT&T has negotiated a billing or provisioning guarantee with a customer, but failed to tariff it. Further, in the hypothetical and implausible event that AT&T would participate in an intense competitive bidding, win the business of a large customer by making installation and provisioning guarantees, but omit those guarantees from the implementing tariff, the customer could go to the FCC and obtain relief under § 205 of the Communications Act -- as the original customer did in the one situation where AT&T was alleged to have filed tariff provisions that violated commitments to that customer. *See* Ad Hoc *amici* Br. 23.

To the extent the Ad Hoc *amici* are concerned that AT&T's position could impair other features of their services -- and require tariffs that represent "manuals" for installing complex services -- they are presenting claims that are not raised by this case and that are baseless. As this Court has held,

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[10] AT&T subsequently filed tariff revisions that increased SDN rates, guaranteed billings within 120 days (60 days in one contract tariff), but that continued to make no installation guarantees. Appendix 11a & 12a.

the tariffing obligation applies to a commitment only if it imposes a "*greater* obligation than implied in the tariff" (*Davis*, 264 U.S. at 561) (emphasis added), involves a "special service and higher responsibility" for which a carrier "might clearly exact a higher rate" (*Kirby*, 225 U.S. at 165), confers an "*advantage* . . . which affects the value of the service to the shipper and its cost to the carrier" (*id.*) (emphasis added), or constitutes an extra service beyond those that the agency has found to have been offered by the tariff. *Wabash R.R.*, 321 U.S. at 410. By contrast, as AT&T maintained in the FCC proceedings cited by the Ad Hoc *amici*, the tariffing obligation does not apply to administrative, procedural, or factual details of the provision of service to particular customers that are fairly encompassed within the definition of the tariffed service. Carriers' nontariffed commitments or practices on these subjects do not impose "greater obligations" on the carrier, but merely provide for the provision of the tariffed service on the terms that the customer has ordered it and are enforceable as a matter of federal law under § 203 and other provisions of the Act.

And the Court has squarely rejected any argument that commitments on these subjects are matters of state law. Although *Kirby*, *Davis*, and their progeny held that the alleged guarantees that service would be installed or billed within a particular number of days are matters that must be tariffed to be valid, the Court has otherwise held that the scope of carriers' obligations under their tariffs is a matter that is committed to the primary jurisdiction and discretion of the federal regulatory agency and that is to be uniformly determined as a matter of federal law.[11] Specifically, the Court has held that the agency

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[11] *See United States* v. *Western Pac. R.R.*, 352 U.S. 59, 63-68 (1956) (questions of the obligations a carrier incurs in exchange for payment of tariffed rate is a matter of "policy which ought to be considered by the (continued...)

determines whether a particular service feature is within the scope of the tariffed service or, conversely, whether it is an "extra" service that constitutes a preference or a rebate because it has been provided at no additional charge.[12]

C. *Kirby* And Its Progeny Are Not Contrary To The Savings Clause, The Alleged Intentional Misconduct Exception, Or § 10 Of The Communications Act.

COT also makes a series of arguments to the effect that the decisions in *Kirby*, *Davis*, and their progeny were erroneous or should no longer be followed.

Savings Clause. First, COT argues that its state law claims were intended to be preserved by the savings clause of 47 U.S.C. § 414 and the cognate provision of the ICA from which § 414 was copied. COT Br. 24-25. But this argument is erroneous, whether or not it was doctrinally correct for this Court previously to hold that the corollaries to §§ 201 to 205 of the Communications Act are an "occupation of the field by Congress which excluded state action." *Postal Tel. Co.*, 251 U.S. at 31; *see* COT Br. 24. In all events, it has been settled since *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), that the terms of § 414 do not "save" state law claims

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[11](...continued)
Commission in the interests of a uniform and expert administration of the regulatory scheme," for "[c]ourts which do not make rates cannot know with exactitude the factors which go into the rate-making process. And for the court here to undertake to fix the limits of the tariff's application without knowledge of such factors, and the extent to which they are present or absent in the particular case, is tantamount to engaging in judicial guesswork").

[12] *See, e.g., United States Smelting*, 339 U.S. at 193 (where tariffed service "begins and ends" is committed to agency's discretion).

that would create actual "conflicts" with federal law by requiring what § 203(c) prohibits. As the Court held, the statute cannot be construed to "destroy itself." *Id.* at 446. *See also Adams Express Co.* v. *Croninger*, 226 U.S. 491, 507-08 (1913). The principle is here controlling, for COT's judgment, like those at issue in *Kirby*, *Davis*, and their progeny, constitutes the "preferences" and "rebates" that § 203(c) prohibits.[13]

Intentional Torts And Willful Misconduct. COT next argues that state law claims for intentional misconduct are both outside the filed tariff doctrine and authorized by the provision of AT&T's tariff that limits the amount of AT&T's liability only for nonwillful violations of the tariff and the Communications Act. Here, there was no violation of AT&T's tariff, either willful or nonwillful. *See* pp. 5-6, *supra*. Further, COT concedes, as it must, that this Court and courts of appeals have repeatedly held that statutory filed tariff requirements preempt any claims that it was "intentional" or "willful" misconduct for a carrier to collect a filed rate and to refrain from extending the rebates and preferences that the Act prohibits. *See Louisville & N. R.R.* v. *Maxwell*, 237 U.S. 94 (1915); *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 126-28 (1990) (collecting cases); COT Br. 35-36.

Nor is there any basis in the Communications Act, this Court's decisions, or common sense for COT's contention that these holdings should now be limited to attempts to enforce discrimination in charges. It would produce the same discrimination if carriers promised a customer superior service

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[13] COT's reliance (Br. 24-25) on *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290 (1976) is misplaced, for it presented no such conflict. There was no filed tariff claim in *Nader*, and the common law damages action was authorized by the agency's regulations that defined the tariffed service. *Id.* at 306-07.

and paid it lost profits if the promise were willfully breached -- as it would be whenever, as here, a carrier deliberately failed to give that customer's orders priority over all other customers. That same "willful" breach occurred in *Kirby* and *Davis*.

Section 10 of the Communications Act. Finally, COT and the Ad Hoc *amici* rely on the recent enactment (in the Telecommunications Act of 1996) of § 10 of the Communications Act. 47 U.S.C. § 160. Section 10 authorizes the FCC prospectively to "forbear" from enforcing "any provision of [the Communications Act]" (including, but not limited to, § 203) for a "telecommunications carrier or a telecommunications service" if the FCC finds that enforcing the provision is not necessary to ensure that charges and practices affecting charges are just, reasonable, and nondiscriminatory and to protect consumers and the public interest. COT and the Ad Hoc *amici* claim that this enactment represents a "policy shift" that establishes that tariff filing requirements are no longer the "heart" of the Act, and retroactively repudiates the holdings of *Kirby* and its progeny.

These contentions would be baseless even if § 10 only applied to § 203, which it does not. The enactment of § 10 has no effect on the settled interpretations of § 203's tariffing requirements to any service to which § 203 applies. To the contrary, this Court has held that these interpretations establish the plain meaning of § 203's terms (*Maislin*, 497 U.S. at 130-31) and that the enactment of legislation authorizing exemptions from these requirements for some carriers or services is, if anything, congressional ratification of the interpretations for all the other carriers or services to which the tariffing requirements continue to apply. *Id.* at 133-36. Under the Telecommunications Act of 1996, the terms and settled interpretation of § 203 (and of each other provision of the Communications Act) will thus prospectively govern a carrier's

services unless and until the FCC has eliminated the requirement in a valid and effective order that establishes a new method of defining *that* carrier's duties to its customers -- as the FCC has yet to do even for those services of nondominant carriers that it believes should be detariffed. In this regard, because the Communications Act has prospectively authorized only those exceptions to § 203's requirements that the FCC validly establishes under § 10's standards, it forecloses any claim that Congress was authorizing courts to create additional exceptions by overruling settled law or committing the question of a carrier's obligations to judges and juries applying the different laws of 50 states.

In all events, the 1996 enactment of § 10 cannot retroactively alter the meaning of § 203 for the carriers who were obligated to comply with it in the past. Even if the 1996 enactment of § 10 could establish that § 203's requirements were not previously the "heart" of the Act -- as it could not -- AT&T and other carriers were, in 1990, still prohibited from extending COT and other customers the rebates and preferences that COT claims, and these carriers could then incur the additional obligations that COT seeks only by tariffing them.

Moreover, between 1989 and 1992, the FCC believed (erroneously) that it had the authority that § 10 has now conferred. But at that time, the FCC had found that AT&T was a "dominant carrier" for which compliance with § 203 was essential to prevent discrimination among similarly situated customers. So even if § 10 had been in effect between 1989 and 1992, AT&T would have been fully subject to § 203's duties.

CONCLUSION

The Ninth Circuit's judgment should be reversed.

Respectfully submitted,

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APPENDIX TO PETITIONER'S REPLY BRIEF

Interstate Commerce Act, 49 U.S.C. § § 6(1) & 6(7) 1a

Examples of AT&T's Tariffed Provisioning Guarantees . . 3a

Examples of AT&T's Tariffed Billing Guarantees 11a

Excerpts from AT&T Contract Tariff Designed for Resellers 13a

TITLE 49 - TRANSPORTATION

CHAPTER 1: INTERSTATE COMMERCE ACT

SEC. 6(1). [49 U.S.C. § 6(1)] Schedules and statements of rates, etc., joint rail and water transportation. -- (1) Schedule of rates, fares, and charges; filing and posting.

Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The

provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter.

SEC. 6(7). [49 U.S.C. § 6(7)] Transportation without filing and publishing rates forbidden; rebates; privileges.

No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

EXAMPLES OF AT&T'S TARIFFED PROVISIONING GUARANTEES

AT&T CONTRACT TARIFF F.C.C. NO. 6612, § 5.1.3.C.

No-Miss Installation Guarantee - A No-Miss Installation Guarantee applies to the Office Connection when ordered for use with AT&T MEGACOM 800 Service. If AT&T misses an installation due date for (1) the Office Connection used in conjunction with AT&T MEGACOM 800 Service; or (2) access ordered from AT&T's Tariff F.C.C. No. 11 for use with AT&T MEGACOM 800 Service; or (3) AT&T MEGACOM 800 Service, AT&T will, at the Customer's option: (1) waive the Office Connection installation charge ordered by the Customer for use with the AT&T MEGACOM 800 Service, or (2) route the Customer's AT&T MEGACOM 800 calls to an AT&T announcement, at no charge, until the service ordered is available; or (3) provide an alternate temporary AT&T 800 READYLINE until the service ordered is available and waive the nonrecurring, recurring, and usage charges for the alternate temporary AT&T READYLINE provided; or (4) route the calls to one of the following to which the Customer currently subscribes: AT&T 800 Service-Domestic, AT&T 800 READYLINE, AT&T 800 Plan E, AT&T 800 Plan K, AT&T MEGACOM 800 Service or AT&T Plus Services until the service ordered is available. A daily credit will be applied to the bill for the alternate AT&T 800 Service for each day the installation of the new service is delayed beyond the installation due date. The amount of the daily credit will be based on the average daily usage charges for the first full month of the new service.

This guarantee does not apply if service installation delay is caused by the Customer beyond the standard installation interval

or as a result of the conditions set forth in AT&T Tariff F.C.C. No. 9. The regulations in AT&T Tariff F.C.C. No. 9 apply to the services subject to this guarantee.

AT&T CONTRACT TARIFF F.C.C. NO. 6653, § 6.E.1.a.

Installation Guarantee - AT&T guarantees that it will complete the initial installations of service components under this COA within 90 days of the COA order date. This Installation Guarantee applies only to installations at Customer Premises that: 1) are within the contiguous 48 states and 2) AT&T was not the provider of telecommunications service at such premises in the 120 days prior to the COA order date under this COA. The customer must order service components included under this Installation Guarantee within 15 days after the customer places its order for service under this COA and the requested due date for initial installation of all service components covered under this Installation Guarantee must be within 90 days of the COA order date. This Installation Guarantee will not apply to failures or delays to meet installation due dates due to causes attributed to the Customer.

In the event that AT&T fails to complete the initial installation at a Customer Premise included under this Installation Guarantee the following credit(s) will apply. The credit(s) will be an amount equal to $10,000 for each Customer Premises where Dedicated Access is provided and $500 for each Customer Premises where Switched Access is provided. The maximum Installation Guarantee credit shall not exceed $500,000 during the COA Term and is in lieu of any other installation credits or installation guarantees as specified in AT&T Tariff F.C.C. No. 1, as amended from time to time.

AT&T CONTRACT TARIFF F.C.C. NO. 7001, § 6.E.1.

Installation Guarantee - AT&T guarantees that it will complete the initial installations of the AT&T Terrestrial 1,544 Mbps Local Channel Services provided under this Contract Tariff within 120 days of the Contract Tariff order date. This Installation Guarantee applies only to installations at Customer Premises that: 1) are within the contiguous 48 states. The customer must order the AT&T Terrestrial 1.544 Mbps Local Channel Services included under this Installation Guarantee within 15 days after the Customer places its order for service under this Contract Tariff and the requested due date for initial installation of all service components covered under this Installation Guarantee must be within 90 days of the Contract Tariff order date. This Installation Guarantee will not apply to failures or delays to meet installation due dates due to causes attributed to the Customer.

In the event that AT&T fails to complete the initial installation at a Customer Premise included under this Installation Guarantee, the Customer may discontinue this Contract Tariff without liability by notifying AT&T in writing at least 30 days prior to the date of discontinuance and provided the Customer has not discontinued another Contract Tariff Term Plan, AT&T Flex Plan or AT&T Service with a revenue, volume or term commitment without liability in conjunction with its order for this Contract Tariff. This Installation Guarantee is in lieu of any other installation guarantees as specified in AT&T Tariff F.C.C. No. 11, as amended from time to time.

AT&T TARIFF F.C.C. NO. 2, § 2.5.10.F.

No-Miss Installation Guarantee - A No-Miss Installation Guarantee applies to AT&T 800 Service-Domestic, AT&T

Advanced 800 Service, AT&T 800 Plan K, AT&T 800 Plan E, AT&T 800 READYLINE AT&T MEGACOM 800 Service, AT&T 800 Gold Service-Dedicated, AT&T 800 Gold Service-Switched and AT&T 800 Gold Service-Nodal. For AT&T 800 Service-Domestic, AT&T Advanced 800 Service, AT&T 800 Plan E, AT&T 800 Plan K, AT&T 800 READYLINE, AT&T 800 Gold Service-Dedicated and AT&T 800 Gold Service-Switched, if AT&T misses an installation due date, AT&T will, at the Customer's option: (1) waive the installation charges for AT&T Advanced 800 Service and the following options ordered in connection with new service: Access Line Extension (Rate-Extension Same Rate Center Area as the Access Line), Four-Wire Terminating Arrangement, Four-Wire Improved Voice Transmission Performance, Dialed Number Identification Service, Non-hunting Number Arrangement, Uniform Call Distribution, Make Busy Arrangement and 800 Telephone Number Changes (Per Telephone Number Added to or Deleted from a routing arrangement); or (2) route the Customer's AT&T 800 Plan E, AT&T 800 Plan K, AT&T 800 Service-Domestic, AT&T 800 READYLINE, AT&T 800 Gold Service-Dedicated or AT&T 800 Gold Service-Switched calls at no charge to an AT&T announcement until the service ordered is available; or (3) provide an alternate temporary AT&T 800 READYLINE until the service ordered is available and waive the nonrecurring, recurring, and usage charges for the alternate temporary AT&T 800 READYLINE provided. If the Customer also ordered AT&T Advanced 800 Service to be used with the service ordered, the Customer will be responsible for paying all appropriate AT&T Advanced 800 Service charges incurred; or (4) route the calls to one of the following to which the Customer currently subscribes: AT&T 800 Service-Domestic, AT&T 800 Plan E, AT&T 800 Plan K, AT&T 800 READYLINE, AT&T MEGACOM 800 Service, AT&T 800 Gold Service-Dedicated, AT&T 800 Gold Service-Switched or AT&T 800 Gold Service-Nodal until the service ordered is

available. A daily credit will be applied to the bill for the alternate AT&T 800 Service for each day the installation of the new service is delayed beyond the installation due date. The amount of the daily credit will be based on the average daily usage charges for the first full month of the new service.

For AT&T MEGACOM 800 Service and AT&T 800 Gold Service-Nodal, if AT&T misses an installation due date or (1) AT&T MEGACOM 800 Service AT&T 800 Gold Service-Nodal or (2) access ordered from AT&T's Tariff F.C.C. No. 9 and/or AT&T's Tariff F.C.C. No. 11 for use with AT&T MEGACOM 800 Service and AT&T 800 Gold Service-Nodal, AST&T will, at the Customer's option: (1) waive the installation charges for the AT&T 800 Service ordered, including installation charges for AT&T Advanced 800 Service ordered in connection with the new service ordered, or (2) route the Customer's AT&T MEGACOM 800 Service or AT&T 800 Gold Service-Nodal calls at no charge to an AT&T announcement until the service ordered is available, or (3) provide an alternate temporary AT&T 000 READYLINE until the service ordered is available and waive the nonrecurring, and usage charges fro the alternate temporary AT&T 800 READYLINE provided. If the Customer also ordered AT&T Advanced 800 READYLINE provided. If the Customer also ordered AT&T Advanced 800 Service to be used with the service ordered, the Customer will be responsible or paying all appropriate AT&T Advanced 800 Service charges incurred; or (4) route the calls to one of the following to which the Customer currently subscribes: AT&T 800 Service-Domestic, AT&T 800 Plan E, AT&T 800 Plan K, AT&T 800 READYLINE, AT&T MEGACOM 800 Service, AT&T 800 Gold Service-Dedicated, AT&T 800 Gold Service-Switched or AT&T 800 Gold Service-Nodal until the service ordered is available. A daily credit will be applied to the bill for the alternate AT&T 800 Service for each day the installation of the

new service is delayed beyond the installation due date. The amount of the daily credit will be based on the average daily usage charges for the first full month of the new service.

An AT&T 800 Gold Service Customer, has the option, if AT&T is unable to provide the requested service within the Customer's requested interval, of having AT&T 800 Service-Switched installed temporarily until the originally requested service is provided. The Customer only pays usage charges associated with the originally requested service until the originally requested service is provided.

This guarantee does not apply if service installation delay is caused by the Customer beyond the installation interval or as a result of the conditions set forth in Section 2.3.1.G. preceding. The regulations in Section 2.5.10 preceding apply to the services subject to this guarantee.

AT&T TARIFF F.C.C. NO. 12, § 7.2.13.C.

Installation Guarantee - An Installation Guarantee applies to Ports associated with Port Access Telephone Numbers (PATNs) and to service associated with Customer-Specified Non-Port Telephone Numbers (CSNPTNs) subject to the limitation of liability in Section 7.2.8. preceding. High Volume or Promotional Port Access Telephone Numbers are not part of this Installation Guarantee. Except for other remedies expressly set forth in these regulations or in a Customer's VTNS option, the following provisions are in lieu of any other claims. If AT&T misses either the Due Date(s) for the initial quantities, or the Due Date(s) for additions, of Ports associated with PATNs or for CSNPTNs, or in the instance of Measured Ports associated with PATNs, the access provided via access components in the Customer's VTNS Option in Tariff F.C.C.

No. 12 or the access associated with VTNS which is furnished from Tariff F.C.C. Nos. 9 and/or 11, then AT&T will, at the Customer's option:

(1) Provide a one-time credit against the Customer's bill in the amount of $100.00 for each affected Measured Port, Rate Option 1 Measured Remote Port, Rate Option 2 Measured Remote Port or CSNPTN, or

(2) route the Customer's calls at no charge to an AT&T announcement until the service ordered is available, or

(3) route the Customer's calls to a Port with a PATN or a CSNPTN which the Customer already has in service until the service ordered is available. A daily credit will apply to the Customer's bill for the alternate Port with a PATN or the CSNPTN for each day the installation f the service ordered is delayed beyond the due date. The amount of the daily credit for alternate Ports with PATNS or the CSNPTNs will be determined by calculating the average daily measured charges on the delayed PATN or CSNPTN during its first full month of service. This credit will be applied in one lump sum once the service ordered becomes available, or

(4) provide an alternate temporary CSNPTN until the service ordered is available. Nonrecurring charges for the alternate temporary CSNPTN, and any usage or other recurring charges will not apply to the provision of the alternate temporary CSNPTN.

This Installation Guarantee does not apply if the service installation delay is caused by the Customer or as a result of the conditions set forth in Section 7.2.8.7. preceding.

AT&T TARIFF F.C.C. NO. 12, § 7.183.1

SCI [Substantially Complete Installation of the entire customized network] must be within three months of the Customer's initial order of Option 181. If SCI is delayed by AT&T, the Customer may cancel its initial order for VTNS without cancellation charges. . . .

EXAMPLES OF AT&T'S TARIFFED BILLING GUARANTEES

AT&T CONTRACT TARIFF F.C.C. NO. 4675, § 6.C.1.2.

SDN Billing Guarantee - The SDN Billing Guarantee will apply to all SDN (1+) direct dialed; 0+ (Calling Card) direct dialed and operator-assisted; and NRA calls. AT&T will bill these calls within 60 days from the Customer's AT&T bill date.

AT&T CONTRACT TARIFF F.C.C. NO. 5548, § 6.E.

Billing Guarantee - AT&T shall bill the Customer for all Services Provided under this Contract Tariff within 90 days after the date the relevant call is placed, the relevant Service is provided, or the applicable charge has accrued. Subject to the exceptions specified below, AT&T will not charge the Customer for services not billed within the 90-days period. The following calling services provided by AT&T under this Contract Tariff are not, however, included in this guarantee: 0+ Calling Card Usage; calls using Rate Schedule K, as specified in AT&T Tariff F.C.C. No. 1, Section 6.4.3.C.7.(a); foreign originated usage; and the rebilling of calls that were previously billed but not paid. Additionally, this guarantee shall not apply to charges billed after 90 days due to the following causes beyond AT&T's control: acts of God, acts of a public enemy, mandatory government action, natural disaster or labor disputes.

[Also appears in AT&T Contract Tariff F.C.C. No. 6816, § 6.E]

AT&T TARIFF F.C.C. NO. 1, § 6.4.2.D.

SDN Billing Guarantee - AT&T guarantees that it will bill Customers for all SDN calls that are subject to the SDN Billing Guarantee within 120 days after the date the call is placed. The billing date is the date on the Customer's regular monthly SDN bill. For example, a call placed on June 12, 1993 is guaranteed to appear on a Customer's bill dated no later than October 10, 1993. Calls subject to the SDN Billing Guarantee are SDN direct dialed (1+) calls rated under any SDN rate schedule (except Schedule F) including Global SDN calls and Network Remote Access calls. The guarantee does not apply to rebilling of calls that were previously billed but not paid for.

AT&T CONTRACT TARIFF F.C.C. NO. 680, § 6.E.1.

DNS Billing Guarantee - AT&T guarantees that it will bill Customers for 99% of DNS calls (excluding DNS Card Calls) within 90 days after the date the call is placed. The billing date is the date on the Customer's regular monthly DNS bill. The guarantee does not apply to rebilling of calls that were previously billed but not paid for.

[Also appears in AT&T Contract Tariff F.C.C. No. 600, § 6.E.2; AT&T Contract Tariff F.C.C. No. 915, § 5.E; AT&T Contract Tariff F.C.C. No. 930, §6.G; AT&T Contract Tariff F.C.C. No. 969, § 6.F; AT&T Contract Tariff F.C.C. No. 1036, § 6.F; AT&T Contract Tariff F.C.C. No. 1756, § 6.D; AT&T Contract Tariff F.C.C. No. 1495, § 6.E; AT&T Contract Tariff F.C.C. No. 2507, §6.E.1; AT&T Contract Tariff F.C.C. No. 5807, §6.E.3; AT&T Contract Tariff F.C.C. No. 6011, § 6.E.3]

EXCERPTS FROM AT&T CONTRACT TARIFF DESIGNED FOR RESELLERS

AT&T CONTRACT TARIFF F.C.C. NO. 1036, §§ 6.E.5 & 6.E.6.F.

DNS Provisioning Credit - AT&T will use its best efforts to provision each of the first one thousand (1,000) locations which a Customer orders each month within 10 business days after receipt of a Customer's order. If, in a given month, AT&T fails to provision any of a Customer's first 1,000 DNS locations for which the Customer has placed an order within 10 business days, for all such locations not provisioned, AT&T will waive the installation charge per DNS Location as specified in AT&T Tariff F.C.C. No. 1, as amended from time to time. A Customer will not be eligible for this waiver in any month in which that Customer's reject rate for DNS orders exceeds fifteen percent (15%) or in which the Customer's orders for service are delayed [pursuant to other provisions of the tariff].

* * * * *

DNS Billing Guarantee - AT&T guarantees that it will bill Customers for 99% of DNS calls (excluding DNS Card Calls) within 90 days after the date the call is placed. The billing date is the date on the Customer's regular monthly DNS bill. The guarantee does not apply to rebilling of calls that were previously billed but not paid for.

[Also appears in AT&T Contract Tariff F.C.C. No. 600, §§ 6.E.2 & 6.E.3; AT&T Contract Tariff F.C.C. No. 930, §§ 6.G. & 6. I]

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

AT&T CORP.,
Petitioner,
v.
CENTRAL OFFICE TELEPHONE, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF UNITED STATES TELEPHONE ASSOCIATION, BELLSOUTH TELECOMMUNICATIONS, BELLSOUTH CORPORATION, PACIFIC BELL AND SOUTHWESTERN BELL TELEPHONE COMPANY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF UNITED STATES TELEPHONE ASSOCIATION, BELLSOUTH TELECOMMUNICATIONS, BELLSOUTH CORPORATION, PACIFIC BELL AND SOUTHWESTERN BELL TELEPHONE COMPANY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE* [1]

The United States Telephone Association ("USTA"), BellSouth Telecommunications and BellSouth Corporation (collectively, "BellSouth"), Pacific Bell and Southwestern Bell Telephone Company ("Southwestern Bell") are keenly interested in the outcome in this case.[2] USTA

---

[1] Pursuant to Rule 37.6 of the Rules of the United States Supreme Court, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] Written consent to the filing of this brief has been obtained from the parties to this case. The consent letters accompany this brief.

is the leading trade association for the local telephone industry in the United States. Founded a century ago, USTA represents over 1,000 small, mid-size and large local exchange carriers ("LECs")—providers of local telephone service—that operate more than 95 percent of the nation's total number of local access lines.[a] BellSouth, Pacific Bell and Southwestern Bell are regional Bell Operating Companies that are members of USTA. BellSouth provides local telephone service as Southern Bell in Florida, Georgia, North Carolina and South Carolina and as South Central Bell in Alabama, Kentucky, Louisiana, Mississippi and Tennessee. Pacific Bell provides local telephone service in California. Southwestern Bell provides local telephone service in Missouri, Kansas, Arkansas, Oklahoma and Texas. USTA, BellSouth, Pacific Bell and Southwestern Bell frequently file *amicus curiae* briefs in the federal courts of appeals and the United States Supreme Court on issues of serious concern to the local telephone industry, and USTA and Pacific Bell thus participated as *amici curiae* in the proceedings below, and USTA, Pacific Bell and Southwestern Bell filed an *amici* brief in this Court in support of the petition for a writ of certiorari.

The Ninth Circuit's decision defining the scope of the "filed tariff," or "filed rate," doctrine substantially affects USTA and its members, including BellSouth, Pacific Bell and Southwestern Bell, because that doctrine governs the legal obligations of LECs, as well as those of long distance carriers such as petitioner. Like long distance carriers, LECs are statutorily required to provide services pursuant to tariffs on file with federal and state regulatory agencies. The rule adopted by the Ninth Circuit in this case accordingly affects the terms of service provided to millions of local telephone customers across the country and directly undermines USTA's important interests in (1) ensuring the stability of a regulatory regime that this

[a] Since petitioner is a provider of long distance services, it is not a member of USTA.

Court repeatedly has upheld and that has served carriers and customers well for many decades; (2) preventing customers from asserting entitlements to rates or services that vary from the rates or services specified in a carrier's published tariffs; and (3) promoting the key federal and state statutory requirements of uniform service and nondiscriminatory pricing.

SUMMARY OF ARGUMENT

As the brief of petitioner demonstrates, this Court repeatedly has held that a carrier's obligations to its customers are governed exclusively by the terms of its filed tariffs, and the Ninth Circuit's decision directly conflicts with this settled interpretation of the Communications Act of 1934. *Amici* USTA, BellSouth, Pacific Bell and Southwestern Bell seek to emphasize two reasons why this Court should continue to adhere to that interpretation of the filed rate doctrine and reverse the decision below.

First, the rule adopted by the Ninth Circuit will result in the very harms that the filed rate doctrine was designed to avoid. By permitting individual customers with greater bargaining power to demand and enforce terms that afford them additional or enhanced services for the rate established in the tariff, the Ninth Circuit's rule sanctions and promotes discriminatory arrangements that defeat the statutory goal of uniform treatment of all customers. And as a further consequence, the Federal Communications Commission (the "FCC" or "Commission") and state public utility commissions are effectively deprived of their exclusive authority to ensure the establishment of fair and nondiscriminatory rates for carrier services. Under the Ninth Circuit's approach, arrangements that have never been reviewed or approved by the FCC (or the state public utility commissions) can be upheld and enforced by courts.

Second, Congress recently confirmed its view that only the Commission, and not customers, carriers, or courts,

should determine when it is appropriate to permit contracts that are not subject to the filed rate doctrine. Congress addressed concerns relating to the continued necessity of the tariff-filing requirement and the filed rate doctrine in Section 10 of the Telecommunications Act of 1996 (the "1996 Act"). That section requires the Commission under certain circumstances to exempt common carriers from any obligation to file tariffs for interstate services, thus leaving to the Commission the exclusive authority to determine when the filed rate doctrine should and should not apply. As the Court stated in reaffirming the filed rate doctrine less than four years ago in *MCI Telecommunications Corp. v. AT&T Co.*, this Court and the FCC "are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." 512 U.S. 218, 231 n.4 (1994). Because the Ninth Circuit's decision cannot be reconciled with Congress' recently enacted, clear statutory design, that decision should be reversed.

ARGUMENT

I. THE NINTH CIRCUIT'S APPROACH WILL RESULT IN THE VERY HARMS THAT THE FILED RATE DOCTRINE WAS DESIGNED TO PREVENT.

For almost a century, filed tariffs have been the cornerstone of the relationship between a regulated common carrier and its customers. Section 203(a) of the Communications Act of 1934 provides that "[e]very common carrier . . . shall . . . file with the Commission and print and keep open for public inspection schedules showing all charges . . . and showing the classifications, practices, and regulations affecting such charges." 47 U.S.C. § 203(a). The statute emphasizes that "no carrier shall . . . charge, demand. collect or receive a greater or less or different compensation for such communication, or for any service in connection therewith . . . other than the charges specified" in the tariff. *Id.* § 203(c). Indeed,

the statute specifically forbids carriers from extending to any person any "privileges or facilities . . . or enforc[ing] any classifications, regulations, or practices affecting such charges, except as specified in [the tariff]." *Id.* States have similar statutory tariff-filing requirements. *See, e.g.*, Cal. Pub. Util. Code § 495 (Deering 1997); N.Y. Pub. Serv. Law § 92 (Consol. 1997). As this Court recently observed, "[t]he tariff-filing requirement is . . . the heart of the common-carrier section of the Communications Act," since "rate filing was Congress's chosen means of preventing unreasonableness and discrimination in charges." *MCI*, 512 U.S. at 229-30.

The filed rate doctrine has long made clear that carriers, such as USTA's members, are forbidden to charge rates for their services other than those specified in the tariffs they have on file with the FCC, or to vary the terms of service in any way from the terms specified in their tariffs. *See Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126 (1990); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981); *Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156, 163 (1922); *Chicago & Alton R.R. v. Kirby*, 225 U.S. 155, 163-66 (1912). State courts consistently have reaffirmed the applicability of the doctrine to tariffs filed with state public utility commissions as well. *See, e.g., Teleconnect Co. v. U. S. West Communications, Inc.*, 508 N.W.2d 644, 647-50 (Iowa 1993); *GTE North Inc. v. Public Serv. Comm'n*, 500 N.W.2d 284, 288-89 (Wis. 1993). LECs and other common carriers thus file detailed tariffs with both the FCC and state regulatory commissions specifying their rates and terms of service, and the carriers are bound to adhere to those tariffs unless a regulatory agency finds them unreasonable. This bright-line rule has ensured the existence of reasonable and nondiscriminatory rates and services, avoided situations of unequal bargaining power between carriers and consumers, minimized unnecessary confusion on the part of both carriers and consumers, and given clear guidance to

the carriers themselves as to the statutory and regulatory requirements that govern their operations. By declining to apply the filed rate doctrine to preempt the respondent's state law claims based on alleged extra-tariff agreements relating to the provision of services, the Ninth Circuit has undermined "Congress's chosen means of preventing unreasonableness and discrimination in charges" throughout the country. *MCI*, 512 U.S. at 230.

Although this case was brought by the customer of a long distance carrier, the Ninth Circuit's interpretation of the filed rate doctrine will have the most substantial impact on local exchange customers and carriers. As discussed below, the 1996 Act gave the FCC the authority to remove the tariff requirements to promote competition, *see* 47 U.S.C. § 160, and the FCC has proposed to exercise that authority with respect to the filing of tariffs relating to the provision of domestic long distance services. *See Policy and Rules Concerning the Interstate Interexchange Marketplace, Second Report & Order*, CC Docket No. 96-61, 11 FCC Rcd 20,730 (1996), *stayed on appeal, MCI Telecomms. Corp. v. FCC*, No. 96-1459 (D.C. Cir. Feb. 13, 1997), *recon.*, FCC No. 97-293 (released Aug. 21, 1997) ("*Detariffing Order*"). The same is not true, however, with respect to the FCC and state-regulated tariff-filing requirements for the provision of other services by local telephone carriers. Thus, *every single incumbent LEC in the country*—more than 1,300 carriers in all—remain fully subject to the statutory tariff-filing requirement at both the federal and state levels. Particularly in these changing times of rapidly increasing competition in all telecommunications markets, continued application of the filed rate doctrine to regulated services is critical to the maintenance of stable, consistent relationships between local carriers and their customers.

The Ninth Circuit's rule eviscerates the benefits of the filed rate doctrine for the provision of local exchange service. First, the lower court's approach will cause significant uncertainty and confusion over the rates that local carriers charge and the services that they provide, despite this Court's long-settled conclusion that rate filing statutes were designed to "render rates definite and certain." *Arizona Grocery Co. v. Atchison, T. & S. F. Ry.*, 284 U.S. 370, 384 (1932). If this Court upholds the Ninth Circuit's approach, telecommunications carriers will remain obligated to file tariffs, charge and collect only the filed rate for the regulated services they provide, and apply their tariffs universally to all similarly situated customers. *See* 47 U.S.C. §§ 201-203. But USTA's members, such as BellSouth, Pacific Bell and Southwestern Bell, as well as other carriers, no longer will be entitled to rely on filed tariffs as the definitive statement of their rights, duties and liabilities with respect to the telecommunications services they provide to customers, and they will have no way to guarantee the provision of uniform service to all customers. To the contrary, customers with varying degrees of bargaining power will obtain—or at least will attempt to assert that they have obtained—different rates and terms of service than the rates and terms of service available under a carrier's filed tariff. As a result, customers who previously could rely on the certainty and predictability of receiving the rate and terms of service specified in tariffs filed with federal and state regulators no longer will have any assurance of the rate to which they are entitled for a particular service, much less the rate paid by, and the services provided to, their competitors.

Second, affirmance of the Ninth Circuit's approach fosters emergence of "side deals" that will defeat the statutory goal of ensuring the provision of uniform rates and services for similarly situated customers. *See Maislin*, 497 U.S. at 126 (quoting *Keogh*, 260 U.S. at 163 (explaining that stringent application of the filed rate doctrine is necessary " 'because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated' ")). In the past, the filed rate doctrine prevented customers from seeking to enforce purported

special arrangements relating to matters such as the availability of lower rates, the provisioning of different services, and the arbitrability of disputes.[4] But under the Ninth Circuit's approach, any customer will be able to claim the benefit of such individualized arrangements and obtain the non-uniform treatment that Congress clearly intended to prevent in the provision of regulated services. Indeed, the "freedom" to deviate from the terms of a tariff promotes the very kind of discriminatory practices and preferences that Congress intended to prohibit. In today's increasingly competitive markets, the Ninth Circuit's rule gives preferred customers the incentive to demand expedited or enhanced services unavailable to others, thereby causing discrimination against other customers who pay the same filed rate. And LECs that are unwilling to offer selected customers the special deals they demand will suffer a competitive disadvantage in providing regulated services.[5]

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[4] Recent examples include: *Fax Telecommunicaciones v. AT&T*, 952 F. Supp. 946, 954 (E.D.N.Y. 1996) (rejecting a claim for a rate different from the tariffed rate); *Teleconnect*, 508 N.W.2d at 648 (rejecting a claim from a customer asking to receive services other than those provided for in the tariff); *MCI Telecomms. Corp. v. Happy the Glass Man, Inc.*, 974 F. Supp. 1016, 1020-21 (E.D. Ky. 1997) (dismissing a complaint claiming that a billing dispute should not proceed to arbitration even though the tariff specifically provided for arbitration); *Pay Phone Concepts, Inc. v. MCI Telecomms. Corp.*, 904 F. Supp. 1202, 1207 (D. Kan. 1995) (same); *see also* note 4 *infra*.

[5] The FCC does allow certain carriers to enter into "contract-based tariffs" with customers. A "contract-based tariff" is a tariff based on an individualized service contract with a customer. Like other tariffs, however, contract-based tariffs still must be filed with the FCC and made available to similarly situated customers throughout the carrier's service area. *See* 47 C.F.R. §§ 61.3(m), 61.55; *see also Competition in the Interstate Interexchange Marketplace, Report & Order*, CC Docket No. 90-132, 6 FCC Rcd 5880, 5902 (1991). Likewise, state public utility commissions often permit carriers to offer services pursuant to "contract service arrangements," which, although designed to meet the needs of a particular customer, are available to others on a nondiscriminatory basis.

Third, the lower court's approach would seriously undermine the FCC's and state public utility commissions' jurisdiction and ability to establish and oversee tariff policy, a critical component of the filed rate doctrine that this Court has emphasized in the past. *See Arkansas Louisiana Gas*, 453 U.S. at 577-78 (noting courts' lack of authority to alter rates subject to the exclusive jurisdiction of regulatory commissions). If private parties are free to ask different courts across the country, rather than the FCC or state commissions, to define the scope of filed tariffs, those agencies will be unable to effectively ensure that carriers apply rates and terms of service equally to all similarly situated customers. As in this case, the Ninth Circuit permitted a jury to interpret a federally filed tariff in one manner, while other factfinders may well interpret the very same tariff differently, thus *requiring* the non-uniform application of the petitioner's tariff. Despite its expertise and knowledge of the industry, and despite its statutorily conferred jurisdiction over tariffs, the FCC's authority to oversee the fair and nondiscriminatory application of tariffs across the country will be seriously diminished.

II. THE NINTH CIRCUIT'S INTERPRETATION CANNOT BE RECONCILED WITH THE 1996 AMENDMENTS TO THE COMMUNICATIONS ACT.

There was no basis for the Ninth Circuit to restrict the scope of the filed rate doctrine established by a century of precedent because the 1996 amendments to the Communications Act of 1934 establish that Congress intended the doctrine to apply unless and until the FCC finds that it should not. Congress determined long ago that the tariff-filing requirement is the appropriate way to ensure that carriers' "charges, practices, classifications, and regulations" are just and reasonable. *See* 47 U.S.C. § 201(b). In enacting Section 203 of the Communications Act, Congress thus gave the FCC—not private parties or courts—the jurisdiction to determine whether carriers' interstate rates and services are just and reasonable.

See id. § 203. Only two years ago, Congress reaffirmed this unambiguous statutory design in amending the Communications Act to confer jurisdiction on the FCC to decide when tariffs no longer are warranted, and thus when the filed rate doctrine no longer would apply. *See* 47 U.S.C. § 160. Because the Ninth Circuit ignored Congress' explicit statutory scheme, this Court should reverse the decision below.

Because Congress has legislated definitively on the requirement that common carriers file tariffs that govern their rates and services, this Court consistently has found the filed rate doctrine applicable to claims of supposed special rate or service arrangements.[6] As recently as 1994, the Court explained in *MCI* that, whatever the merits of Congress' chosen means of preventing rate discrimination, the statute clearly requires adherence to the filed rate doctrine. As the Court reasoned, "there is considerable 'debate in other forums about the wisdom of the filed rate doctrine,' . . . [b]ut our estimations, and

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[6] *See, e.g., Maislin*, 497 U.S. at 126 (reaffirming that the filed rate doctrine prohibits variance from the filed rate); *Arkansas Louisiana Gas*, 453 U.S. at 582 (finding that the filed rate doctrine precluded an award of damages when the contract rate differed from the rate in the filed tariff); *Davis v. Cornwell*, 264 U.S. 560, 561-62 (1924) (refusing to enforce a contract providing for a service not specified in the filed tariff); *Keogh*, 260 U.S. at 163 (finding that the "rights as defined by the tariff cannot be varied or enlarged by . . . contract . . . of the carrier"); *Western Union Tel. Co. v. Esteve Bros. & Co.*, 256 U.S. 566, 572 (1921) (holding that a customer was bound to the terms of the filed tariff limiting carrier liability even though the customer never agreed to the term); *Chicago & Alton R.R.*, 225 U.S. at 163-66 (refusing to allow a carrier to provide a service outside of its specified tariff); *Armour Packing Co. v. United States*, 209 U.S. 56, 81 (1908) (refusing to enforce a contract because "[i]f the rates are subject to secret alteration by special agreement then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart").

the Commission's estimations, of desirable policy cannot alter the meaning of the Federal Communications Act of 1934." *MCI*, 512 U.S. at 234 (quoting *Security Servs., Inc. v. Kmart Corp.*, 511 U.S. 431, 440 (1994)). The Court concluded that, "[f]or better or worse, the Act establishes a rate-regulation, filed-tariff system for common-carrier communications," and efforts to circumvent that result "'address themselves to Congress, not to the courts.'" *Id.* (*quoting Armour Packing*, 209 U.S. at 82); *see also Maislin*, 497 U.S. at 135-36 (stating that "[i]f strict adherence to [the statutory tariff-filing requirement] as embodied in the filed rate doctrine has become an anachronism . . ., it is the responsibility of Congress to modify or eliminate these sections").

The policy justifications for the statutory tariff-filing requirement and the filed rate doctrine nevertheless have been the subject of continuing debate. After all, for more than a decade, not only carriers but the Commission itself unsuccessfully had sought to eliminate the tariff-filing requirement for some services, particularly for domestic long distance services. *See MCI*, 512 U.S. at 220-23. Plaintiffs also continued to file unsuccessful lawsuits in courts across the country seeking to override the filed rate doctrine and look beyond the terms of carriers' tariffs despite Congress' statutory scheme. *See, e.g., Pay Phone Concepts*, 904 F. Supp. at 1207; *International Telecomms. Exch. Corp. v. MCI Telecomms. Corp.*, 892 F. Supp. 1520, 1541 (N.D. Ga. 1995).

Against this backdrop, Congress enacted the 1996 Act, which specifically addresses the concerns that had been raised. *See Detariffing Order*, 11 FCC Rcd at 20,738 (noting that Congress enacted Section 10 "[a]gainst this background" of efforts to detariff long distance services). But instead of abolishing the tariff-filing requirement, Congress chose to give the FCC the authority to determine when rates and services could be detariffed and thus when the filed rate doctrine would be inapplicable. Section 10(a) provides:

[T]he Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that—

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.

47 U.S.C. § 160(a); *see also* S. Conf. Rep. No. 104-230, at 184 (1996). Section 10(b) goes on to require that the Commission, in deciding whether to exercise its forbearance authority, "shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services." 47 U.S.C. § 160(b).[7] Thus, Congress made clear that only the Commission—not private parties or courts—has the authority to determine when competitive conditions justify reducing regulatory oversight and no longer necessitate

[7] Some state legislatures similarly have granted state public utility commissions the authority to forbear from requiring the filing of tariffs for intrastate services upon making analogous findings. *See, e.g.*, Cal. Pub. Util. Code § 495.7 (Deering 1997); Mont. Code Ann. § 69-3-808 (1997).

the filing of otherwise statutorily-required tariffs. Only then would the filed rate doctrine no longer be relevant.

Since the enactment of the 1996 Act, the Commission has exercised its statutorily-conferred forbearance authority in a number of circumstances. In some cases, the Commission has determined that competitive circumstances have warranted the detariffing of certain services, and in those cases carriers now are free to enter into separately negotiated arrangements with their customers that are subject to neither the tariff filing requirement of Section 203 nor the filed rate doctrine. *See, e.g., Hyperion Telecommunications, Inc., Memorandum Opinion & Order & Notice of Proposed Rulemaking*, CC Docket No. 97-146, 12 FCC Rcd 8596 (1997) ("*Hyperion Order*") (permissively detariffing competitive access providers' provision of interstate exchange access services). The FCC may detariff other services in the near future, as several petitions requesting detariffing presently are pending before the FCC or are on appeal.[8] The FCC also has determined that, for some services, the circumstances are not yet appropriate to permit detariffing. *See, e.g., De-*

[8] *See, e.g., Hyperion Order*, 12 FCC Rcd at 8613 (proposing mandatory detariffing for non-incumbent LEC providers of interstate exchange access services); "BOCs Petition the Commission for Forbearance of Section 203(c)(2) of the Communications Act To Issue SMS/800 Refund," *Public Notice*, DA 97-1235 (released June 11, 1997) (seeking comment on a petition by the Bell Operating Companies for forbearance from the application of Section 203(c)(2) of the Communications Act to allow those carriers to refund certain revenues); "Common Carrier Bureau Seeks Suggestions on Forbearance," *Public Notice*, DA 96-798, IAD 96-150 (released May 17, 1996) (soliciting informal comments regarding implementation of Section 10(a)); *Detariffing Order*, 11 FCC Rcd at 20,742-68 (mandatorily detariffing interstate, domestic, interexchange carriers); "Common Carrier Bureau Seeks Further Comment on Specific Questions in OSP Reform Rulemaking Proceeding," *Billed Party Preferences for InterLATA O+ Calls*, CC Docket No. 92-77, *Public Notice*, DA 96-1695, 11 FCC Rcd 12,830 (released Oct. 10, 1996) (seeking comment with respect to forbearance from applying statutory requirement that operator service providers file informational tariffs).

tariffing Order, 11 FCC Rcd at 20,783 (maintaining the tariff-filing requirement for the international portion of bundled domestic and international service offerings pending further proceedings). Customers seeking to obtain special arrangements may request that the FCC exercise its forbearance authority as well. In short, Congress has devised a scheme that the Commission is responsible for implementing consistent with the congressional design. While the respondent may prefer "the introduction of a whole new regime of regulation," that regime "is not the one that Congress established." *MCI*, 512 U.S. at 234.

Congress' statutory design also makes good sense. The FCC (at the federal level) and the state public utility commissions (at the state level) are the expert agencies that have been charged by Congress and the state legislatures with deciding whether competitive conditions are such that tariffs are no longer necessary to ensure that rates are just and reasonable and that services are provided to all customers on a nondiscriminatory basis. The typical detariffing decision is based on many factors, including the competitiveness of the market, the geographic location of the market, economic factors that may affect the market, pricing strategies, historical data, the long-range potential of the service and the impact of detariffing on state commissions and consumers. *See, e.g., Detariffing Order*, 11 FCC Rcd at 20,742-68 (discussing factors that the FCC reviewed in deciding whether to detariff long distance carriers). Particularly in today's ever-changing telecommunications marketplace, Congress' decision to make the FCC responsible for determining when market conditions are sufficiently competitive to relax regulatory oversight should be respected.

Moreover, allowing the FCC to forbear from requiring the filing of tariffs gives both the FCC and regulated common carriers much-needed flexibility. As Congress recognized in enacting the 1996 Act, both the FCC and telecommunications carriers must have the ability to adapt

to a marketplace characterized by rapidly changing technology and new competitive entrants. *See* Telecommunications Act of 1996, Pub. Law No. 104-104, Preamble, 1996 U.S.C.C.A.N. (110 Stat.) 56 (stating that the purpose of the 1996 Act is "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies"). Such flexibility is particularly important in order to enable the agency to eliminate unnecessary regulation as market conditions warrant and thus carry out the procompetitive, deregulatory objectives of the 1996 Act, while at the same time ensuring that carriers' pricing practices and delivery of services are fair to all customers. The ability to enter into more flexible pricing and service arrangements in an increasingly competitive environment in turn enables carriers to adjust their operations in accordance with their own business judgment in order to compete more effectively with new market entrants. In short, under Congress' carefully designed legislative scheme, the FCC properly has the sole authority to remove unnecessary regulatory burdens on common carriers, giving those carriers the flexibility that they need in order to compete effectively in today's telecommunications marketplace.

In *MCI*, this Court made it clear that it is for Congress, not the courts, to revise or abolish the filed rate doctrine. In the 1996 amendments to the Communications Act of 1934, Congress adopted a measured approach to detariffing the telecommunications industry, and specifically delegated detariffing authority to the FCC. The decision of the Ninth Circuit undermines that statutory scheme.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit should be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

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v.

CENTRAL OFFICE TELEPHONE CO.,

Respondent.

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On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE AD HOC TELECOMMUNICATIONS USERS COMMITTEE, THE BANKERS CLEARING HOUSE, THE NEW YORK CLEARING HOUSE ASSOCIATION, ALLIED SIGNAL, INC., AMERICAN INTERNATIONAL GROUP, INC., THE BANK OF NEW YORK, BANKAMERICA CORPORATION, CITIBANK, N.A., FIRST DATA CORPORATION, FORD MOTOR COMPANY, HONEYWELL INC., HYATT CORPORATION, MARINE MIDLAND BANK, MICROSOFT CORPORATION, THE ONLINE COMPUTER LIBRARY CENTER (OCLC), THE SABRE GROUP, INC., THOMPSON & COMPANY, UNITED PARCEL SERVICE (UPS), UNITED SERVICES AUTOMOBILE ASSOCIATION (USAA), VISA INTERNATIONAL SERVICE ASSOCIATION, INC., WAL-MART STORES, INC. AND WORLDSPAN SERVICES LIMITED AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE* *

This case raises several issues of critical importance to large customers in the enormous and rapidly growing market for interstate telecommunications services. First, what is the scope of the statutory requirement that carriers tariff the "classification, practices, and regulations affecting [their] charges"? Second, how are the courts and regulators to deal with efforts by carriers and their customers to address service-related matters that fall *outside* the scope of the tariffing requirement? Third, does the filed rate doctrine as embodied in Section 203(c) of the Communications Act of 1934 (the "Act") preclude a carrier's customers from availing themselves of state law remedies with respect to such non-rate-affecting terms?

For over a decade, agreements between the major providers of interstate and international interexchange services and their large customers have had three components: (a) the general terms of the applicable carrier tariffs; (b) customer-specific tariff "options"; and (c) contracts, which may vary from a two-page order form to 50-100 pages of text and lengthy technical appendices.

The rate-related terms of these arrangements are filed with the Federal Communications Commission (the "Commission" or "FCC"), either in the carrier's general tariffs or in customer-specific tariff "options," which are available to similarly situated customers. The carriers uniformly resist including *non*-rate-related terms in their tariffs, and these are therefore found principally in the contracts. The Commission has found that customer-specific arrangements structured in this manner are consistent with the purposes of the Communications Act and are not unlawfully dis-

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* Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

criminatory. That determination has been upheld by the courts.[1]

By urging a broad reading of the phrase "affecting charges" as it is used in Section 203(c) of the Act, Petitioner AT&T Corp. ("AT&T") seeks to re-write the statute's tariffing provisions to cover things that Congress expressly chose *not* to cover. If AT&T's reading is adopted by this Court, many of the untariffed provisions of its own (and its competitors') contracts could be nullified, releasing the carriers from obligations that they freely assumed and depriving their customers of significant benefits attained through competitive bidding and hard-fought negotiation.

Amici are large users of the telecommunications services of the major interexchange carriers (AT&T, MCI and Sprint) and organizations of such users. The Ad Hoc Telecommunications Users Committee is an unincorporated association whose members include the nation's largest business users of telecommunications services and products; the organization represents its members' interests in telecommunications matters before the Commission and in the federal courts. The Bankers Clearing House and the New York Clearing House Association are associations of leading banks in California and New York, respectively. They serve as clearinghouses through which their members settle accounts and present checks and other payment instruments; they also represent their members on issues of common concern before the Commission and in the courts. Allied Signal, Inc. is an advanced technology and manufacturing company serving customers worldwide with aerospace and automotive products, chemicals, fibers, plastics and other advanced materials. American International Group, Inc. is a U.S.-based international insurance organization and among the largest underwriters of commercial and industrial coverages in the United States. The Bank of New York is one of the oldest banks in the

[1] *Competitive Telecom. Ass'n v. FCC*, 998 F.2d 1058, 1064 (D.C. Cir. 1993) ("[S]o far as 'unreasonable discrimination' is concerned, an apple does not have to be priced the same as an orange."). *See Sea-Land Svc. Inc. v. ICC*, 783 F.2d 1311, 1317 (D.C. Cir. 1984).

nation, offering banking and other financial services to corporations, businesses and individuals worldwide. BankAmerica Corporation provides financial products and services to individuals, corporations, small- and mid-sized businesses, government agencies and financial institutions throughout the world; it is the nation's second largest banking company based upon market capitalization at the close of 1997. Citibank, N.A. offers personal, corporate, business, professional and international banking and credit card services to millions of consumers throughout the world. First Data Corporation is a provider of credit card processing, payment systems, electronic commerce and information-based services to businesses and consumers in over 140 countries. Ford Motor Company is a global automotive manufacturing concern with customers in 200 countries and territories, 370,000 employees and annual sales in excess of $150 billion; subsidiaries include financial services and car rental operations. Honeywell Inc. supplies security, safety, energy efficiency and environmental control technology for home, building and industrial use and for the aviation and space markets; it employs 57,500 people in 95 countries and had sales of $8 billion in 1997. Hyatt Corporation manages, operates, leases and franchises hotels and resorts in the United States, Canada and the Caribbean. Marine Midland Bank, a subsidiary of HSBC Americas, Inc., is a New York State regional banking institution that serves individuals and business customers. Microsoft Corporation is engaged in the development and marketing of software products and services; it employs an array of telecommunications services to support its corporate communications worldwide. The Online Computer Library Center (OCLC) is a nonprofit, membership library, computer service and research organization whose networks and services link more than 25,000 libraries in the U.S. and 63 countries and territories. The SABRE Group, Inc. is a leader in the electronic distribution of travel-related products and services and a provider of information technology solutions for the travel and transportation industry. Thompson & Company is a na-

tionwide mail order catalog company specializing in cigar products; its affiliates specialize in catalog sales of gifts and linens. United Parcel Service (UPS) is the world's largest package distribution company, providing delivery and information-based services in more than 200 countries and territories; UPS and its technology and logistics subsidiaries employ more than 338,000 people and have revenues in excess of $22 billion. United Services Automobile Association (USAA) is a worldwide insurance and diversified financial services company serving more than three million customers, primarily members of the U.S. military and their families. VISA International Service Association, Inc. is an association of financial institutions that use the VISA service mark in connection with payment systems (including debit and credit cards), check authorizations, automated teller machines and related services. Wal-Mart Stores, Inc. employs more than 720,000 associates at its more than 2,300 stores and 440 Sam's Club membership warehouses within the United States; over 105,000 people are also employed in Argentina, Brazil, Canada, China, Germany, Indonesia, Mexico and Puerto Rico. WorldSpan Services Limited operates a computer reservations system that provides travel information to airlines, hotels, car rental companies and travel agents, servicing over 18,000 subscribers worldwide.

Amici (and their members, in the case of associations) have entered into multi-year, multi-million-dollar service agreements with one or more interexchange carriers. They have a keen interest in the enforceability of these agreements, including the terms that do not affect rates but are nevertheless an integral part of their service arrangements. *Amici* fear that a broad reading of Section 203(c) of the Act could nullify many of the untariffed provisions of customer/carrier contracts, calling into question one of the principal benefits of competition in the interexchange market. *Amici* submit this brief in order to discuss the scope of the filed rate doctrine as applied to such agreements from a perspective shared by neither Petitioner nor Respondent.[2]

STATEMENT OF THE CASE

Until the mid-1980's, even the largest corporations met their telecommunications needs by purchasing services at the prices (and on the terms) contained in "standard" tariffs filed by carriers with the Commission. Prompted by a series of FCC rulings relieving them of the burden of filing tariffs, newly emergent interexchange carriers (notably MCI and Sprint) began to offer service to large business users pursuant to individually negotiated contracts.[3] In 1987, AT&T began to negotiate customized service arrangements with its customers in order to meet this competitive challenge. Because the Commission's policies required AT&T to tariff its interstate telecommunications services, AT&T incorporated the rates and rate-affecting provisions of these arrangements into customer-specific tariffs, initially filed as "options" under its Tariff F.C.C. No. 12 (which was designed for this purpose), and later in "contract tariffs."[4] When the Commission's detariffing

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[2] *Amici* have secured the consent of both Petitioner and Respondent to the filing of this brief. Copies of letters granting consent are being filed herewith.

[3] *See Policies and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Therefor*, Fourth Report and Order, 95 F.C.C.2d 554 (1983) (relieving "non-dominant" carriers of the obligation to file tariffs). The courts' doubts concerning the Commission's authority to waive the Act's filing requirement culminated in *MCI Telecom. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218 (1994).

[4] The Commission rejected legal challenges to AT&T's Tariff 12, holding that it did not violate the Act's prohibition on unreasonable discrimination so long as each offering was made available to similarly situated customers. *AT&T Communications*, 6 F.C.C.R. 7039 (1991), *aff'd sub nom. Competitive Telecom. Ass'n v. FCC*, *supra* note 1. The Commission later authorized AT&T and other interexchange carriers to file so-called "contract tariffs." *Competition in the Interstate, Interexchange Marketplace*, Report and Order, 6 F.C.C.R. 5880, 5911 (1991) (*"Interexchange Competition Order"*).

policies for AT&T's competitors were struck down by the courts,[5] those carriers also began filing customer-specific tariffs.

Today, most large users solicit bids from one or more carriers (either informally or by means of a detailed "request for proposals"), work with the bidders to improve their offers, and award the business based upon an analysis of the "best and final" offer of each and only after extensive negotiations. The competition is often heated, yielding competitive prices and hitherto unavailable features designed to meet the needs of individual customers. By the end of 1997, AT&T had nearly 9,000 customized tariff arrangements on file with the Commission; MCI and Sprint had 9,000 more between them. Negotiated service arrangements are the most competitive segment of the interstate interexchange market.[6]

The Commission has adapted its regulatory policies to these market realities, streamlining the tariff process and ruling that customized arrangements do not offend the Act's prohibition on unjust or unreasonable discrimination so long as they are made generally available to similarly situated customers. The agency took these steps to encourage carriers to meet the needs of business customers "competing actively in the increasingly globalized and increasingly information-based world economy."[7] Most recently the Commission, acting on authority granted by Congress in its 1996 amendments to the Act, eliminated the tariff filing requirement for domestic interexchange services.[8]

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[5] *See* note 3, *supra*.

[6] *See Interexchange Competition Order* at 5887; *Competition in the Interstate, Interexchange Marketplace*, Notice of Proposed Rulemaking, 5 F.C.C.R. 2627, 2634-35 (1990) (*"Interexchange Competition NPRM"*).

[7] *Interexchange Competition NPRM*, at 2641.

[8] *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order, 11 F.C.C.R. 20730 (1996) (*"Detariffing Order"*); *recon.*, 1997 FCC LEXIS 4453 (*"Detariffing Reconsideration Order"*), *stay issued and appeal docketed sub nom. MCI Telecom. Corp. v. FCC*, Case No. 96-1459 (D.C. Cir.).

SUMMARY OF ARGUMENT

The Court should decline the invitation to expand the filed rate doctrine beyond the limits set by Congress in the Communications Act. The Act requires AT&T to tariff its rates and rate-affecting terms for interstate and international telecommunications service, and requires AT&T to adhere to those terms. But the Act does *not* require AT&T to tariff terms that are not rate-affecting, even if they are material to a carrier's relationship with a customer. Indeed, Congress made clear in recent amendments to the Act that it does not view as central to the purposes of the Act the filing of tariffs for rates or rate-related terms, let alone the tariffing of all manner of non-rate-affecting terms.

AT&T's statements to the Commission and its business practices are inconsistent with the position that it advocates in this case. In 1990, AT&T successfully argued to the Commission that the Act does not require it to tariff contractual provisions that do not affect its rates. It cited as examples of such provisions implementation plans and billing requirements, the very matters at the heart of its dispute with Respondent. (The Commission agreed, and limited its new rules for customer-specific tariffs to volume, term and discount requirements and other terms of service that affect the charges paid by customers.) More recently, AT&T has told the Commission that provisions that are not required to be tariffed are not subject to the filed rate doctrine.

Over the years, the Commission has given AT&T and its competitors the flexibility to offer attractive rates, terms and conditions to business users in return for significant volume and term commitments and costly penalties for early termination. The rates and rate-affecting terms are tariffed, but many non-rate-affecting terms that

are integral to implementing and maintaining the services described in the tariff are not. These provisions are of value to the customer and often impose costs on the carrier but, because the market for business services is highly competive, increases in vendor costs do not necessarily translate into increases in customer charges. In other words, a feature or term that is valuable and/or cost-affecting is not always rate-affecting.

AT&T's practice of not tariffing many negotiated terms is fully consistent with the Act, which requires the filing of only rates and rate-affecting provisions. AT&T's argument in this case—that the Act requires it to tariff any term that imparts value to customers and imposes costs on AT&T—is not consistent with the Act and, if adopted by the Court, could substantially disrupt the telecommunications marketplace.

ARGUMENT

I. The Filed Rate Doctrine Should Be Construed In Accordance With The Text Of The Communications Act.

The filed rate doctrine spelled out in Section 203(c) of the Communications Act is a corollary of the tariff-filing requirement of Section 203(a). Both provisions are limited to a carrier's charges and the terms and conditions "affecting such charges." To apply these requirements to *all* terms and conditions of service would be to read the limiting phrase out of the statute, in contravention of this Court's articulated approach to statutory interpretation.[9]

A. *The Filed Rate Doctrine Pertains Only To Rates And Rate-Affecting Terms.*

AT&T's Brief (at p. 4) sets out the relevant statutory provisions, but glosses over a critical difference between Sections 201 and 202 of the Act on the one hand and

[9] Statutory language is not to be presumed to be meaningless "surplusage." *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 698 (1995). Thus, where Congress has designated certain items as the subject of a statute, the inference to be drawn is that items not so designated were intended to be excluded. *Ex parte McCardle*, 7 Wall (74 U.S.) 506 (1868).

Section 203 on the other. Section 201(b) requires a carrier's "charges, practices, classifications, and regulations" to be "just and reasonable." There is no limitation on the practices, classifications or regulations that are subject to this standard. 47 U.S.C. § 201(b). Section 202(a) prohibits carriers from unjustly or unreasonably discriminating in connection with "charges, practices, classifications, regulations, facilities, or services" for "like" communications services. 47 U.S.C. § 202(a). Again, there are no limitations on the practices, classifications, regulations, facilities, or services that are subject to this prohibition.

In contrast, Section 203(a) requires carriers to file tariffs showing only their "charges [and the] . . . classifications, practices, and regulations *affecting such charges.*" Similarly, Section 203(c) makes it unlawful for a carrier to "charge, demand, collect, or receive a greater or less or different compensation . . . than the charges specified in" its tariffs, or to "employ or enforce any classifications, regulations, or practices *affecting such charges,* except as specified in its tariffs. 47 U.S.C. §§ 203(a), (c).

In short, the Act imposes the just and reasonable standard and the anti-discrimination obligation on all classifications, practices and regulations, but Section 203's tariff-filing requirement and the filed rate doctrine apply only to those charges and classifications, practices, and regulations that affect a carrier's charges. The Commission has implemented Section 203 by adopting rules that require interexchange carriers to include the following in their tariffs for customer-specific offerings: the term of the contract (including any renewal options), a brief description of services provided, minimum volume requirements, the contract price for each service, a geenral description of any volume requirements, the contract price for each service, a general description of any volume discounts built into the contract rate structure, and "a general description of other classifications, practices and regulations affecting the contract rate." 47 C.F.R. § 61.55(c).

AT&T's argument is fundamentally flawed in that it erroneously assumes that all tariff-based statutes are identical, and that the filed rate doctrine must therefore be applied in the same manner in all regimes. Most of the cases cited by AT&T concern statutes (notably the Interstate Commerce Act or "ICA") whose language was significantly broader than Section 203(c) of the Act when the cases relied upon by AT&T were decided.[10] *Compare* 47 U.S.C. § 203(a) (carriers shall file "schedules showing all charges . . . and . . . the classifications, practices, and regulations *affecting such charges*") *with* § 6 of the ICA:

> [tariffs] shall show[] all the rates, fares, and charges for transportation[11] . . . . and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations *which in any wise change, affect, or determine any part of the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered* to the passenger, shipper, or consignee.

34 Stat. 584 (1914) (repealed 1997), *quoted in Southern Ry. v. Prescott*, 240 U.S. 632, 637 (emphasis added); *Boston and Maine R.R. v. Hooker*, 233 U.S. 97, 114-15 (1916). The ICA's tariffing requirement for common carrier regulations and practices—and its corollary, the filed rate doctrine—were obviously broader than those in the Communications Act. In particular, they were not

[10] AT&T asserts that case law applying the ICA is applicable because the legislative history of the Communications Act states that § 203 was "copied" from the earlier statute. Pet'r Br. at p. 23 n.18. The argument goes too far if it asks the Court to ignore unambiguous differences in the language of the two statutes.

[11] "Transportation" was a term of art under the ICA, and included "all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property trasported." *Southern Ry. v. Prescott*, 240 U.S. 632, 637 (1916). "Communications" has not been given so expansive an interpretation under the Communications Act. *See* note 30, *infra*.

limited to rate-affecting provisions. Petitioner's heavy reliance on cases interpreting the ICA is misplaced.[12]

AT&T's argument loses much of its force once it is stripped of inapposite authority. For example, AT&T cites *Prescott*, 240 U.S. at 638, for the proposition that the filed rate doctrine applies not only to rates, but to *any* of the services within the purview of the relevant statute. Pet'r Br. at p. 27. But *Prescott*, which involved Sections 1 and 6 of the ICA, sheds no light on the scope of the Communications Act, because, as discussed above, the tariffing requirements of the two statutes are different.[13] *See also Boston & Maine R.R. v. Hooker*, 233 U.S. at 114-15 (addressing scope of tariffing provision of § 6 of the ICA).

AT&T concedes that the filed rate doctrine applies only to charges and terms "affecting . . . charges." Pet'r Br. at p. 26. But *Amici* and AT&T disagree over the meaning of the phrase "affecting such charges." To *Amici*, a term or condition affects charges if it establishes what charge will be applied, under what circumstances a charge will be applied or waived, or how a charge will be calculated.[14] A

[12] *See also Transcontinental Bus System, Inc. v. Civil Aeronautics Bd.*, 382 F.2d 466, 476 (5th Cir. 1967) (Federal Aviation Act (based on the ICA) requires air carriers' tariffs to show "all rates, fares, and charges for air transportation . . . and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation.").

[13] The ICA differed from the Communications Act in that "the entire body of . . . services should be included under the single [statutorily-defined] term 'transportation' and subjected to the provisions of the Act respecting reasonable rates and the like." 240 U.S. at 638. That is not the case under the Communications Act's more limited requirements.

[14] The first category might include provisions making the customer eligible for a discount from, or waiver of, certain charges. An example of the second would be a provision establishing an early termination charge and setting out the grounds on which a customer may terminate early without liability for that charge. The third category would include a provision stating that all calls will be

practice, classification or regulation does not affect charges unless it determines what (or under what circumstances) the customer must pay.

AT&T appears to advocate a much broader interpretation.[15] Under this view, tariffs are seen as the "core" or "heart" of the statutory scheme enacted by Congress to prevent discrimination. In order to prevent circumvention of that scheme, the rights of the parties "as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier."[16] Although AT&T suggests that the filed rate doctrine does not encompass all aspects of the carrier/customer relationship, Pet'r Br. at p. 35, it also states that the doctrine applies to any provision that affects the value received by the customer and the costs incurred by the carrier. Pet'r. Br. at p. 28.[17] As the

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rounded up to the next full minute for purposes of applying per-minute charges.

[15] For example, Petitioner asserts that the filed rate doctrine "operates as a strict rule against the use of 'parol evidence' and alleged side agreements," Pet'r Br. at 25. This misstates the parol evidence rule and would read into tariffs a merger clause that would bar agreements on non-rate-related matters, which do not have to be tariffed in the first place. The applicabiilty of the parol evidence rule to agreements about non-tariff issues depends on whether the agreement is a total integration and whether it includes a merger clause. *See, e.g., International Telecom. Exchange Corp. v. MCI Telecom. Corp.*, 892 F. Supp. 1520, 1537 (N.D. Ga. 1995) (merger clause barred parol evidence of communications contract incorporating a tariff).

[16] Pet'r Br. at pp. 25, 28, quoting *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922) and *Chicago & Altoa R.R. v. Kirby*, 225 U.S. 155 (1912).

[17] AT&T's Petition for *Certiorari* (at p. 13) stated that "the tariff describes the entirety of the legal relationship between the carrier and customer, and its terms 'are conclusive as to the rights of the parties.'" The United States Telephone Association and others, filing as *amici curiae* in support of AT&T, endorse that view, stating that "a carrier's obligations to its customers are governed *exclusively* by the terms of its filed tariffs." Brief *Amici Curiae* of the United States Telephone Association *et al.* at p. 3 (emphasis added) ("USTA Br.").

foregoing discussion demonstrates, this formulation of the doctrine is at odds with the text of Section 203(c) and rests upon case law interpreting the ICA's different (and markedly broader) regulatory regime.

B. *Congress Has Determined That Tariffs Are* Not *The Linchpin Of The Regulatory Regime Established By The Act.*

In *MCI Telecom. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218 (1994), the Court voided the FCC's effort to eliminate tariff filings, finding that it

> greatly undervalues the importance of the [tariff] filing requirement itself. . . The tariff filing requirement is . . . the heart of the common-carrier section of the Communications Act. In the context of the Interstate Commerce Act, which served as its model . . . this Court has repeatedly stressed that rate filing was Congress's chosen means of preventing unreasonableness and discrimination in charges. . . As the *Maislin* court concluded, compliance with these provisions is 'utterly central' to the administration of the Act. . . . What we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist. That may be a good idea, but it was not the idea Congress enacted into law in 1934.[18]

The broad definition of "rate affecting" endorsed by Judge Brunetti's dissent below and advanced by AT&T here flows directly from that view of the "scheme of rate regulation." The Court advised those (including the Commission) who wished to modify or eliminate the Act's tariff-filing requirements to address their concerns to Con-

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[18] 512 U.S. at 229-232. The Court expressed the view that, while eliminating the tariff filing requirement would not necessarily frustrate the ultimate purposes of the Act, "we (and the FCC) are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed for the pursuit of those purposes." 512 U.S. at 231 n.4.

gress.[19] They did, and Congress responded in 1996 by directing the FCC to forbear from applying any provision of the Communications Act, including the tariff-filing requirement of Section 203(a), if certain conditions are met.[20] In granting the FCC forbearance authority, Congress necessarily concluded that the tariff-filing requirement is not "essential to the ultimate purposes of the Act."

The Commission promptly sought to exercise its new authority by taking steps to eliminate tariffs—in no small part to end carrier abuse of the filed rate doctrine.[21] In its order requiring non-dominant carriers to withdraw their tariffs for domestic services, the Commission spelled out the ways in which regulators and aggrieved parties can determine whether a carrier has engaged in unreasonable discrimination or unjust and unreasonable conduct without consulting the carrier's filed tariff.[22]

Although the Commission's efforts to eliminate tariffs in competitive telecommunications markets have not yet taken effect,[23] it can no longer be argued that the filed

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[19] 512 U.S. at 232-34.

[20] Telecommunications Act of 1996, § 401, codified at 47 U.S.C. § 160. Although the forbearance authority granted to the Commission under the Telecommunications Act of 1996 is not limited to the Act's tariff-filing requirement, no one disputes that this was its intended target. *See* Pet'r Br. at p. 24 n.20; USTA Br. at p. 10.

[21] *See* Section III.A, below.

[22] The Commission found that market forces will likely deter unreasonable discrimination and unjust or unreasonable practices. It also noted that carriers must provide detailed price and service information to the Commission on request, and that private parties who believe they are the victims of discrimination may seek redress under the agency's complaint process (which makes provision for discovery). *Detariffing Reconsideration Order* at ¶ 68 & n.210.

[23] The major interexchange carriers believe that Section 401 of the Telecommunications Act of 1996 requires the Commission to allow them to file tariffs if they wish to do so, and have appealed the *Detariffing Order*. *See* note 8, *supra*.

rate doctrine is an essential component—much less the "heart"—of the telecommunications regulatory regime. Whether or not the 1996 amendments to the Act authorized the Commission to *require* carriers to withdraw their tariffs, it cannot be denied that Congress has authorized the Commission to *permit* carriers to do so. And as AT&T told the Commission, once the tariff-filing requirement is eliminated, "[v]alid and enforceable rates can be established through mechanisms other than filed tariffs, such as through unfiled contracts." According to AT&T, "[t]he sole purpose of the filed rate doctrine is to enforce a regime in which tariff filings are mandatory," and where tariff filings are not mandatory, "the filed rate doctrine does not apply."[24]

It is worth noting that Congress's grant of forbearance authority and the FCC's efforts to act on that authority do not represent a radical break from prior policy trends but rather an extension of them.[25] New interexchange tariffs and tariff modifications may now be filed at 5:30 p.m. to take effect six-and-a-half hours later, with no advance review by the agency and no opportunity for a private party to seek an order that would prevent the tariff from taking effect. 47 C.F.R. § 61.23(c). The summary nature of the process reflects the conclusion reached by the

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[24] Letter from J. Argentieri, Government Affairs Director, AT&T Corp. to W.F. Caton, Acting Secretary, FCC (Dec. 19, 1996) (ex parte filing). A copy of that letter is attached to this brief as Appendix A.

[25] Nearly 20 years ago, the Commission began to eliminate or streamline tariff-filing requirements for "non-dominant" carriers (*i.e.*, those that lack market power) otherwise subject to the Act. *See Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Common Carrier Services*, First Report and Order, 85 F.C.C.2d 1 (1980). It streamlined AT&T's tariff-filing obligations in 1991. *Interexchange Competition Order*, 6 F.C.C.R. at 5895 (shortening the public notice period and eliminating lengthy cost support). The Commission later declared AT&T non-dominant, thus making its filings presumptively lawful. *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 F.C.C.R. 3271 (1995).

Commission long ago that tariffs are not essential to the operation of the regulatory regime in competitive segments of the telecommunications industry.

II. AT&T's View Of The Filed Rate Doctrine Is At Odds With The Manner In Which It Conducts Its Business And Its Positions Before The Federal Communications Commission.

As noted above, AT&T argues that any contract clause that provides value to the customer or imposes a cost on the carrier "affects" charges for service and is therefore not enforceable unless filed in the carrier's tariff. Pet'r Br. at p. 28. But AT&T's conduct in the marketplace and its positions before the Commission are at odds with the broad view of the filed rate doctrine that it espouses here. Like the carrier in *Security Services, Inc. v. Kmart Corp.*, 511 U.S. 431, 442 (1994), AT&T "cannot have it both ways."

A. *The Major Carriers Negotiate Non-Rate-Affecting Contract Terms That Address Important Issues And Are (Correctly) Not Filed In Their Tariffs.*

The business relationships between a carrier and its large customers are highly complex. Marketed by the carriers as "strategic partnerships," network service agreements involve substantial undertakings by both parties in a variety of areas over long periods of time.[26] Managers responsible for the procurement, installation, maintenance and operation of business networks know that tariffs cannot exclusively govern the relationship between the carrier and the customer, because tariffs simply do not address non-rate-affecting but nonetheless crucial operational, technical and legal issues. Congress wrote a regulatory statute for telecommunications, not a manual for installing and maintaining high-volume call centers and sophisticated data networks, and carriers and their customers need to

[26] Although most contracts have terms of 3-5 years, they are periodically renegotiated and extended. Some of the *Amici* are taking service under terms and conditions (but not prices) negotiated nearly a decade ago.

make agreements about details that have nothing to do with the rate-affecting terms contained in the tariffs.

AT&T implicitly concedes that carrier undertakings for which no separate charge is imposed do not have to be tariffed—*i.e.*, do not "affect[] . . . charges" for purposes of Section 203.[27] That concession is consistent with, but only begins to describe, how AT&T and other carriers actually operate in the market.

AT&T's Tariff F.C.C. No. 12 is one of several vehicles under which it provides comprehensive service arrangements to its largest customers. When its competitors challenged the lawfulness of the offering several years ago, AT&T submitted an affidavit from Dennis Lewis, AT&T's Director of Marketing for Business Communications Services, concerning the competitive environment facing his employer. Mr. Lewis described the kinds of assistance that large corporate users require of their carriers: [28]

[27] AT&T makes this concession in connection with the billing options available to SDN customers. If a customer chooses "network billing," AT&T renders a single bill for the service and the customer must allocate charges among its business units (or, in the case of a reseller, among its own customers) and "re-bill" the charges. Under the "multi-location billing" option, AT&T performs this function. Pet'r Br. at p. 8 nn. 10-11. Multi-location billing is of considerable value to the customer and imposes significant costs on the carrier. Yet AT&T explains that "*Neither of these options is described in the tariff, for no separate charge is imposed for either option.*" Pet'r Br. at p. 8 (emphasis added).

[28] AT&T's Comments on AT&T Tariff 12 Issues on Remand, *AT&T Communications; Revisions to Tariff F.C.C. No. 12*, CC Docket No. 87-568, Affidavit of Dennis Lewis at ¶¶ 6, 13 (filed Mar. 4, 1991) ("Lewis Affidavit"). AT&T's Tariff 12 was challenged by competing carriers as unlawfully discriminatory in violation of Section 202(a) of the Communications Act. After its initial order upholding Tariff 12 was reversed on appeal, *MCI Telecom. Corp. v. FCC*, 917 F.2d 30 (D.C. Cir. 1990), the Commission opened a proceeding on remand. Mr. Lewis' affidavit, which was filed in that proceeding, was intended to demonstrate that AT&T's Tariff 12 offering was a response to unique customer demands. The Commission's subsequent order again rejected challenges to Tariff 12, and was affirmed on appeal. *See* note 4, *supra*.

- measurement of network availability and other performance standards on a network-wide basis
- management through a single point of contact for the entire customer organization
- certain levels of staffing support
- customized billing formats
- periodic network management reports
- procedures relating to opening and closing "trouble tickets" (*i.e.*, reports of service outages or other problems)
- the development and implementation of disaster recovery procedures
- procedures for "escalating" disputes up each party's management chain of command
- flexibility in responding to changes in the customer's business communications requirements

Mr. Lewis explained that AT&T took these customer requirements seriously, noting that "[T]hese customers were always very explicit that if AT&T was unable to provide the customized service they demanded, AT&T would lose the customer business to one of AT&T's competitors." [29]

Attached to this Brief as Appendix B are tables of contents from three contracts for interstate network services between large business users and leading interexchange carriers, edited only to remove all identifying information so as to comply with contractual confidentiality requirements. These documents demonstrate that the carriers do, in fact, seek to meet the customer requirements described in Mr. Lewis's affidavit. The Appendix contains a chart that correlates each of these customer requirements with provisions of the sample contracts. Because they do not affect the charges paid by the customers

[29] Lewis Affidavit, ¶ 8.

for service, these terms and conditions are not included in the carriers' tariffs.[30]

B. *AT&T Negotiates Contract Terms That Implement Its Tariffed Services and Represents To Its Customers That Such Terms Are Fully Enforceable.*

The major interexchange carriers (including AT&T) enter into contracts that address matters that, while not rate-affecting, are nonetheless crucial to the execution of the tariffed obligations of both carrier and customer.

AT&T's F.C.C. Tariff No. 12 illustrates the point. The tariff describes in detail the "virtual telecommunications network service" provided and sets out what charges will apply and under what circumstances. It does *not* address many matters that are crucial to the carrier/customer relationship but do not affect those charges. Section 7.2.10.A, for example, states that "Payment for [service] is due upon presentation of the bill. [Service] may be denied for nonpayment of a bill . . . ." Another section permits AT&T to deny service for nonpayment of charges due, requires AT&T to give at least five days'

[30] Judge Brunetti, dissenting in the case below, agreed with the majority that the "services" at issue in this case were not reflected in the applicable AT&T tariff, but concluded that the customer's claims could not be sustained because "AT&T is simply barred from contracting for non-tariffed services." *Central Office Tel., Inc. v. AT&T Corp.*, 108 F.3d 981, 994 (9th Cir. 1997) (Brunetti, J., dissenting). Judge Brunetti reached this (erroneous) conclusion based upon a case interpreting the ICA, which allowed transportation companies operating as common carriers to provide only those services for which rates had been tariffed. 108 F.3d at 995; *see* note 13, *supra*. Communications carriers are not similarly restricted. For example, all of the major interexchange carriers offer untariffed "enhanced" transmission services. *See Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 204 (D.C. Cir. 1982) *cert. denied*, 461 U.S. 938 (1983) (Title II of the Act inapplicable to such services); 47 U.S.C. § 153(43) (defining "telecommunications" to exclude services classified as "enhanced"). AT&T (and its competitors) also manage communications networks for large customers. *See* www.att.com/solution and www.systemhouse.mci.com (information about AT&T's and MCI unregulated consulting and "outsourcing" services).

notice prior to denying service, and states that service will be restored upon payment of the charges. The tariff does not, however, explain when "presentation" occurs (when a bill is sent? upon the customer's receipt?), what constitutes a "bill" (how much detail? what format?) or what constitutes nonpayment of charges (may amounts disputed in good faith be withheld?). None of these items concerns the carrier's charges for service, although all are of importance to the parties. Under Section 203(a) of the Act, all of them may be addressed outside the tariff. And the enforcement of any off-tariff arrangement on these matters is not barred by Section 203(c).

AT&T argues that any aspect of the carrier/customer relationship that the tariff fails to address may be "filled in" only by "that which could be 'implied in the tariff' as a matter of federal law under principles of tariff interpretation: that is, to 'use diligence' and to act reasonably." Pet'r Br. at p. 34 (citations omitted). But "federal law" offers no meaningful guidance regarding the format or content of carrier invoices, appropriate procedures for their distribution to a customer's business units (or a reseller's customers), or other non-rate-affecting matters. The interpretation of Section 203(c) that AT&T urges here—that the carrier and the customer may not agree upon what constitutes "due diligence" or what it means for the carrier to "act reasonably"—contradicts AT&T's own practices.[31]

Decisions regarding which provisions of complex and comprehensive service agreements must be included in the carriers' tariffs are ultimately made by the carriers. When

[31] AT&T's argument also suggests that the Communications Act preempts state law claims, a proposition that is doubly unfounded. First, this Court has found complete preemption of state claims under only two federal statutes—Section 301 of the Labor Management Relations Act, *see Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968), and Section 502(a) of ERISA, *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987). Second, such a reading would nullify the savings clause that Congress inserted in the Communications Act. 47 U.S.C. § 414.

pressed by their large customers to include more contract terms in the customized tariffs, the carriers often refuse on the grounds that the terms are not rate-affecting and that they want to minimize the amount of information disclosed to competitors. But all of the major interexchange carriers —including AT&T—have responded to customer concerns about the enforceability of non-tariffed terms by representing that the contracts are valid and binding as written, that the non-tariffed terms are fully enforceable by both parties, and promising to revise applicable portions of their tariffs in order to eliminate any conflict that may arise between a tariff provision and the contract.[32]

Insofar as the carriers negotiate provisions that offer "value" to the customer and impose some "cost" on the carrier, AT&T's arguments would effectively render them unenforceable. If the Court now adopts AT&T's view of the law, large customers will be in the position of having committed to purchase tens or hundreds of millions of dollars of telecommunications services based upon reciprocal commitments that the carriers will (arguably) no longer be required to meet.

C. *The Broad View Of The Filed Rate Doctrine Advocated By AT&T Here Contradicts AT&T's Prior Statements To The Federal Communications Commission.*

AT&T has, on several occasions, addressed the scope of the filed rate doctrine (and/or the companion tariff-filing requirement) before the FCC. In each instance described below, it has urged the agency to adopt a construction that is narrower than it now advocates to this Court.

In 1990, the Commission opened a proceeding to examine whether changes in its rules were appropriate in light of the burgeoning competition in the interstate interexchange marketplace. One of the issues addressed was

[32] *See* Sections entitled "Valid, Binding, Enforceable" and "Construction" in the tables of contents contained in Appendix B.

whether to permit AT&T and other interexchange carriers to offer services by means of individually negotiated arrangements, so long as the rates and rate-related terms thereof were filed in tariffs as required by Section 203(a) of the Act.[33] Although AT&T supported the "contract tariff" proposal, it opposed the Commission's initial plan to require carrier/customer contracts to be filed with the agency. AT&T argued that such a requirement would be "an . . . unwarranted departure from current practice" and unnecessary in light of the fact that such contracts may contain provisions that "do not relate to rates for telecommunications services or classifications and practices affecting such rates [including] provisions addressed to collocation . . . implementation plans and billing procedures." [34]

In response to the inclusion of forbearance authority in the newly-enacted Telecommunications Act of 1996,[35] the Commission proposed to require all providers of interexchange services who lack "market power" to withdraw their tariffs for domestic services.[36] AT&T urged the agency to adopt a "permissive" approach instead, under which carriers could choose whether or not to file tariffs. In response to concerns about the operation of the filed rate doctrine under such a regime, AT&T told the Com-

[33] *Interexchange Competition Order*, 6 F.C.C.R. at 5897-5903.

[34] Comments of American Telephone and Telegraph Co. at pp. 64-65 & n.*, *Competition Rulemaking*, 6 F.C.C.R. 5880 (filed Jul. 3, 1990). Collocation refers to the placement of customer equipment in carrier switching facilities. Needless to say, it is of considerable value to customers and imposes costs on carriers.

[35] 47 U.S.C. § 160(a) ("[T]he Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, if the Commission determines that [three enumerated conditions are met].")

[36] *See Detariffing Order*, 11 F.C.C.R. at 20732. AT&T falls within this category. *See Motion of AT&T Corp. to be Classified as a Non-Dominant Carrier*, note 25, *supra*.

mission that the doctrine is "not a talisman that trumps all contractual agreements" and that it would not apply to any matters that are lawfully addressed in off-tariff arrangements.[37] By that test, matters that are lawfully addressed in contracts—implementation plans, billing procedures, and the many other matters described in Section II.A above—would not fall within the scope of the filed rate doctrine.

In *The People's Network, Inc., v. American Tel. & Tel. Co.*,[38] the FCC's Common Carrier Bureau ruled on a formal complaint brought by a reseller of AT&T's SDN and other services. The customer claimed, *inter alia*, that AT&T had violated Section 203(a) of the Act by failing to reflect tariff limitations on the number of orders that it would process each month for an SDN customer or each week for a Distributed Network Services customer. According to the Bureau, "AT&T responded to this claim by arguing that its order limits do not affect the charges applicable for its services and that Section 203(a) therefore does not require their inclusion in the tariff." [39] The number of orders that a carrier will agree to process in any single month or week from a customer is a matter of great value to the customer and, most likely, a cost item to the carrier. Indeed, it is of a piece with assurances concerning the timeliness of installations once a carrier has

[37] Letter from J. Argentieri, note 24, *supra* and Appendix A. *See also* AT&T Corp. Petition for Limited Reconsideration and Clarification, *Policies and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61 at p. 16 (filed Dec. 23, 1996) (urging extension of permissive detariffing to the international portions of integrated customer-specific offerings so as to avoid the confusion that would result if part of the agreement was subject to the filed rate doctrine and part was not).

[38] 1997 FCC LEXIS 1928 (Common Carrier Bur. rel. Apr. 10, 1997).

[39] *Id.* at ¶ 33. The Bureau agreed with AT&T's reading of Section 203(a) and rejected the customer's claim.

accepted an order. Yet, in *The People's Network*, AT&T successfully argued that such matters are not rate-affecting.

III. The Court Should Not Expand The Filed Rate Doctrine Beyond What The Statute Requires.

The language of Section 203(c) of the Communications Act, as well as the crucial distinction between it and the tariff provisions of the ICA, offer ample grounds on which to decline AT&T's invitation to adopt an expansive view of the file rate doctrine as it applies to interstate telecommunications. Important considerations of policy and recent developments in the way in which communications are marketed offer additional support for a narrow reading of the doctrine.

A. *The Doctrine Should Not Be Broadened In Light Of The Harsh Effects Acknowledged By The Federal Communications Commission And The Courts That Have Applied It.*

Regulated carriers often claim that the filed rate doctrine is beneficial for customers and for that reason (and others) should be nurtured by the Commission and the courts and broadly construed.[40] Customers, however, have found that the doctrine is most commonly invoked to their detriment, and the Commission has emphatically agreed:

> [W]e reject carriers' arguments that the "filed-rate" doctrine benefits customers by creating certainty in the carrier-customer relationship. In fact, the "filed rate" doctrine creates uncertainty in the carrier-customer relationship. Invocation of the "filed rate" doctrine can be especially harmful to consumers who have signed long-term service contracts with interexchange carriers . . . . [T]he doctrine permits interexchange carriers to subsequently file a tariff that differs from the long-term contract, and if justified by substantial cause, unilaterally to alter or abrogate their contractual obligations in a manner that is not available in most commercial relationships and that undermines consumers' legitimate business expectations. The "filed-rate" doctrine also harms residential and small business consumers who utilize mass market services and do not enter into long-term service arrangements. Such customers may purchase these mass market services in response to representations made by sales agents of the interexchange carrier or advertisements. In addition, such customers may assume the interexchange carrier will not modify its rates without actual notice to the customer. In the event of a dispute about the representations made by a sales agent, or a subsequent modification to an interexchange carrier's rates, terms, or conditions without actual notice to customers, a customer would be bound by the tariffed rates, terms, and conditions.[41]

Several courts, and the dissent below, have acknowledged that the doctrine frequently works a fundamental unfairness on customers. *See* 108 F.3d at 999 (Brunetti, J., dissenting); *see also Louisville & Nashville R. R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915) (filed rate doctrine "may work hardship in some cases . . . ."); *Marco Supply Co. v. AT&T Communications, Inc.*, 875 F.2d 434, 435-36 (4th Cir. 1989). This argues against an interpretation of the doctrine that encompasses all aspects of the legal relationship between carrier and customer.

As the Court is aware, its decision several years ago in *Maislin Indus. v. Primary Steel, Inc.*, 497 U.S. 116 (1990) and subsequent developments in the trucking industry have spawned a series of cases applying the filed rate doctrine under the Motor Carrier Act. *See, e.g., ICC v. Transcom Line*, 513 U.S. 138 (1995); *Reiter v. Cooper*, 507 U.S. 258 (1993). Some lower Federal courts, with a nod to *Maislin* and other ICA cases, have been deciding Communications Act cases in a manner

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[40] *See, e.g.*, USTA Br. at pp. 5-7; Petition of Frontier Communications for Reconsideration, *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61 at p. 5 (filed Dec. 23, 1996) ("The filed rate doctrine is beneficial to consumers.").

[41] *Detariffing Reconsideration Order* at ¶ 13 (footnotes omitted).

that is not only harsh for customers but, more importantly, unwarranted under Section 203(c) of the Communications Act. These decisions adopt sweeping formulations of the filed rate doctrine that shield carriers from liability for arguably actionable conduct on non-rate-affecting matters with no analysis of whether the subject provisions are rate-affecting. *See, e.g., Pay Phone Concepts, Inc. v. MCI Telecom. Corp.*, 904 F. Supp. 1202, 1207 (D. Kan. 1995) (a billing dispute is subject to the mandatory arbitration clause in the carrier's tariff, which "exclusively controls the rights and liability" between carrier and customer); *Fax Telecommunicaciones v. AT&T*, 952 F. Supp. 946, 954 (E.D.N.Y. 1996) (no liability can arise from a carrier's failure to file a contract tariff as promised and that the customer victimized by the carrier's failure to file must pay standard rates). By adopting a view of the filed rate doctrine that is grounded firmly on the text of the Communications Act, as opposed to some other statute, this Court could (and should) clarify the role and operation of the filed rate doctrine and give appropriate direction to lower courts called upon to adjudicate carrier/customer disputes.

B. *The Filed Rate Doctrine Should Not Be Broadened In Light Of The History Of Communications Carriers Abusing Their Perceived Rights Under It.*

Among the important public benefits allegedly served by the filed rate doctrine is that it "enable[s] the existence of reasonable and non-discriminatory rates and services, avoid[s] situations of unequal bargaining power between carriers and consumers [and] minimize[s] unnecessary confusion on the part of both carriers and consumers." USTA Br. at pp. 5-6. In truth, the doctrine gives carriers the upper hand, for it effectively permits a carrier to make whatever promises it considers necessary to secure a customer's commitment and then file tariffs that fail to reflect those promises—all with the assurance that the tariffed terms will prevail in any dispute.[42] Nor does the doctrine

[42] *See* 952 F. Supp. at 954.

ensure that customers understand and agree to be bound by filed rates and terms. The record in the Commission's recent *Detariffing* proceeding is replete with tales of misleading representations by carrier personnel.[43] Several examples of the carriers' willingness to take unfair advantage of the filed rate doctrine illustrate the scope of potential abuse.

In August 1993, AT&T filed Contract Tariff No. 383 for an individual customer. The following month, AT&T filed an amendment significantly limiting the application of certain usage credits under the Contract Tariff. Three new customers had submitted orders for the offering prior to the effective date of the tariff amendment and protested to the Commission, citing AT&T's failure to seek their approval before making material adverse tariff changes. They withdrew their protests only after AT&T agreed to permit them to take service under the tariff as it had existed at the time their orders were placed.[44]

In 1994-95, MCI filed several modifications to its tariff that were adverse to customers with long-term service arrangements; those changes were made without the consent (or even the knowledge) of MCI's customers. The first modification doubled the charge for early termination of certain contracts.[45] The second modification involved the addition of a provision that automatically renews certain

[43] Petition for Further Reconsideration by Telecommunications Research and Action Center and Consumer Federation of America, *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket 96-61 at p. 3 (filed Dec. 4, 1997).

[44] These events are recounted in *AT&T Communications, Apparent Liability for Forfeiture & Order to Show Cause*, Notice of Apparent Liability for Forfeiture & Order to Show Cause, 10 F.C.C.R. 1664 (1995).

[45] Prior to the amendment, a customer was liable for any commitment applicable to the year in which the termination occurred, plus an amount equal to 35% of the commitments for the remaining years of the term. The amendment required the customer to also repay any promotional credits previously received. MCI Telecommunications Corp., Tariff F.C.C. No. 1, § C.183752.

multi-year service arrangements unless the customer "provides written notification to cancel the [plan], which must be received by MCI not less than 30 days prior to the expiration of the term."[46] Customers who negotiated such arrangements with MCI that neither stated nor implied that a customer was required to give notice of its intent *not* to renew now face the threat of substantial penalties if they want to exercise their bargained-for right to change carriers at the end of the service term. At about the same time, MCI also added rules for arbitrating payment disputes that expressly deny customers the right to a copy of their bills, deprive arbitrators of authority to prevent MCI from suspending service while the arbitration is pending, and require customers, as a condition of taking service, to waive their statutory right to a Commission or court determination of the lawfulness of MCI's charges.[47] In yet another filing, MCI modified its tariff provisions relating to toll fraud so as to make its customers strictly liable for all unauthorized use occurring after either the customer notifies MCI or MCI notifies the customer of suspected fraud.[48] This shift of all liability to the customer would abrogate any commitment previously made by MCI to carry out customer-requested call blocking to minimize fraud.

Recently, carriers have cited the filed rate doctrine in defense of their efforts to unilaterally raise the rates payable under negotiated, fixed-fee service arrangements.

[46] MCI Telecommunications Corp., Tariff F.C.C. No. 1, § C.3.18372.

[47] MCI Telecommunications Corp., Tariff F.C.C. No. 1, §§ B.7.1353, B.7.13811-13812. The tariff allows MCI to compel arbitration of all disputes in excess of $10,000 under the auspices of J.A.M.S./ENDISPUTE. MCI Telecommunications Corp. Tariff F.C.C. No. 1, § B.7.13. Last year, pre-trial discovery in *MCI Telecom. Corp. v. Matrix Communications Corp.*, Civ. No. 96-11975-EFH (D. Mass.) disclosed that MCI has a contract with that organization for the provision of litigation support services in connection with arbitrations involving MCI and its customers. That fact is not disclosed to customers in the MCI tariff.

[48] MCI Telecommunications Corp., Tariff F.C.C. No. 1, § B.4.102.

A series of Commission rulings has imposed certain new costs on interexchange carriers, at the same time that it has mandated decreases in other costs.[49] The major carriers have sought to pass the cost increases (but not the cost decreases) on to their customers despite agreements contained in tariffs and contracts capping the applicable rates at the negotiated levels. Some carriers have taken this stance even in connection with agreements signed *after* the Commission adopted the orders that gave rise to the cost changes. In other words, each such carrier has proposed more favorable rates than its competitors, won the customer's business, bound the customer to a multi-year multi-million-dollar commitment, and then raised those rates based upon factors that were known to the carrier when it made its bid and signed the contract. When challenged by irate customers, the carriers reply that the filed rate doctrine requires the customer to pay the new tariffed rate!

Effectively free from regulatory oversight, yet assured that whatever clauses they put in tariffs will "trump" their contracts even if users are not told of (and do not consent to) the new provisions, interexchange carriers have become increasingly willing to insert one-sided terms in their tariffs. The filed rate doctrine shields such behavior when

[49] For example, the Commission has ordered carriers to compensate operators for each call for toll-free long distance call made from a payphone. *Implementation of the Pay Telephone Reclassification and Compensation Provision of the Telecommunications Act of 1996*, Report and Order, 11 F.C.C.R. 20541 (1996), *recon.*, 11 F.C.C.R. 21233 (1996), *aff'd in part, vacated in part sub nom. Illinois Pub. Telecom. Ass'n v. FCC*, 117 F.3d 555, *clarified*, 123 F.3d 693 (D.C. Cir. 1997). *See also, Federal-State Joint Board on Universal Service*, Report and Order 12 F.C.C.R. 8776 (1997) (carrier contributions to a Universal Service Fund); *Access Charge Reform*, First Report and Order, FCC 97-158, (1997), *appeal docketed sub nom. Southwestern Bell Tel. Co. v. FCC*, No. 97-2618 (8th Cir.) (increasing per-line charges for connection to local exchange networks); and *Price Cap Performance Review for Local Exchange Carriers*, Order, 12 F.C.C.R. 10175 (1997), *appeal docketed sub nom. United States Tel. Ass'n v. FCC*, No. 97-1469 (D.C. Cir.) (reducing usage-based access charges).

it involves rates or rate-affecting terms, but this Court should not needlessly extend that shield to a broader range of carrier behavior.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court interpret the Communications Act's tariffing provisions as they are written.

Respectfully submitted,

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February 20, 1998

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APPENDICES

APPENDIX A

[AT&T Logo]

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July 17, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: *Ex Parte Presentation*—CC Docket No. 96-61

Dear Mr. Caton:

Today AT&T provided copies of the attached document to Richard Welch, Chief, Policy Division, Common Carrier Bureau, and to Melissa Waksman, Christopher Heimann, Jordan Goldstein, and Patrick DeGraba, also of the Policy Division of the Common Carrier Bureau.

Two copies of this Notice, along with the attached letter, are being submitted to the Secretary of the FCC in accordance with Section 1.1206(a)(1) of the Commission's rules.

Sincerely,

/s/ Judy Argentieri

Attachment

cc: R. Welch
M. Waksman
C. Heimann
J. Goldstein
P. DeGraba

AT&T Ex Parte Presentation—CC Docket No. 96-61

Permissive Detariffing And The Filed Rate Doctrine

Although a majority of commenters in CC Docket No. 96-61 support *permissive* detariffing, a few commenters continue to support mandatory detariffing,[1] at least for negotiated service arrangements, based on the purported concern that unless detariffing were mandatory, carriers could continue to file tariffs and invoke the filed rate doctrine to make unilateral changes to carrier-customer deals. A brief analysis of the filed rate doctrine, however, makes plain that this "problem" is chimerical. The filed rate doctrine is a product of a specific legal regime—a regime of mandatory tariffs—not a talisman that trumps all contractual agreements. As explained below, under a *permissive* detariffing regime, a written contract could specify that it is controlling over subsequent tariff filings, and the customer could then assert the contract as a defense to any claim based on such filed tariffs.

The filed rate doctrine was the product of two interrelated subsections of the Interstate Commerce Act (ICA). First, the ICA required that carriers make public filings disclosing their rates. Second, and correlatively, carriers were prohibited from charging or collecting any rates other than filed rates. These two requirements served as the model for Sections 203(a) and (c) of the Communi-

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[1] As explained in its comments in this docket, and in its July 10, 1996 *ex parte*, AT&T does not believe that the Commission may lawfully order mandatory detariffing, for two reasons. First, the Commission's authority under Section 10 permits it to refrain from requiring tariffs, but does not extend to prohibiting the filing of tariffs. Second, because the record establishes that mandatory detariffing would impose enormous costs on carriers and customers, particularly with respect to casual calling and services provided to residential and small business customers, with no countervailing benefits that could not be achieved through permissive detariffing, a mandatory detariffing rule would not be "in the public interest."

cations Act.[2] The purposes of the tariff requirements of both the ICA and the Communications Act were "to render rates definite and certain, and to prevent discrimination and other abuses"[3] by ensuring that all customers paid the same charges—the filed rate—for the same service. In numerous decisions, the Supreme Court construed these requirements to mean that "the rate of the carrier duly filed is the only lawful rate."[4]

The Supreme Court's decisions make clear that that the filed rate doctrine necessarily derives from the requirement that all rates be filed. The sole purpose of the filed rate doctrine is to enforce a regime in which tariff filings are mandatory. As the Supreme Court explained in *Maislin*, allowing a carrier to charge other than filed rates would "render nugatory" the statutory requirement that all rates be filed.[5] The filed rate doctrine thus reduces to a syllogism: If a rate must be filed in order to be valid, then unfiled rates cannot be valid.

By exercising its statutory forbearance authority to adopt permissive detariffing, the Commission would eliminate the major premise of the syllogism—the requirement that all rates be filed. Valid and enforceable rates can be established through mechanisms other than filed tariffs, such as through unfiled contracts. There is simply no basis for the assertion that the filed rate doctrine would vitiate contract rates in a permissive detariffing scheme. A carrier that had agreed to rates in an unfiled contract could no longer claim that the filed rate was the "only lawful rate."

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[2] *MCI v. AT&T*, 114 S. Ct. 2223, 2231 (1994).

[3] *Maislin Indus. v. Primary Steel, Inc.*, 497 U.S. 116, 126 (1990) (citing *Arizona Grocery Co. v. Atchison, T. & S.F.R.R. Co.*, 284 U.S. 370, 384 (1932)).

[4] *E.g., id.* at 127, *quoting Louisville & Nashville RR Co. v. Maxwell*, 237 U.S. 94, 97 (1915).

[5] *Maislin*, 497 U.S. at 132.

Indeed, the courts have recognized that where the statute at issue, or the agency acting within its statutory authority, permits rates and other terms of service to be established other than through filings with the agency, the filed rate doctrine does not apply.[6] Thus, in *Maislin*, the Supreme Court invalidated the Interstate Commerce Commission's (ICC) "Negotiated Rates" policy based on its conclusion that the ICC had no authority to abrogate the ICA's requirement that all rates be filed. Conversely, the court's opinion makes clear that the Negotiated Rates policy could have been sustained had the ICA given to the ICC the forbearance authority which Congress has now given to the Commission in Section 10.[7]

It has nevertheless been suggested that in a permissive detariffing regime, a carrier could "voluntarily" file and attempt to enforce a tariff against a customer with which the carrier had previously entered into a written agreement providing that the contractual terms would control over any inconsistent tariff provisions. This argument, which is based on the language in Section 203(c) requiring that a carrier charge and collect its filed rates, ignores the fact that the Commission's Section 10 forbearance authority extends to Section 203(c) no less than to Section 203(a). Indeed, Section 203(c) itself provides that its requirement that carriers collect their filed rates is inapplicable where "otherwise provided by or under the authority of this Act."

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[6] *See Arkansas Louisiana Gas Company v. Hall*, 453 U.S. 571 (1981) (recognizing that carrier must charge and collect the filed rate, "[e]xcept when the Commission [validly] permits a waiver"). In a later proceeding in *Arkansas Louisiana*, the Fifth Circuit observed that the Supreme Court's decision in that case "clearly recognized that the waiver provisions of [15 U.S.C. § 717(d) authorized] the Commission to waive the usual requirements of timely filing of an alteration in a rate." *Hall v. FERC*, 691 F.2d 1184, 1189 (5th Cir. 1982) (quotation omitted). Accordingly, *Hall v. FERC* expressly noted that the filed rate doctrine would not bar exercise of FERC's waiver authority. *Id.*

[7] *Maislin*, 497 U.S. at 133-35.

If the Commission were to exercise its authority under new Section 10 to forbear from enforcing Sections 203(a) and 203(c) when a carrier and a customer have entered into an unfiled written agreement, and thereby adopt permissive detariffing, a carrier could not invoke the filed rate doctrine to make unilateral changes to the terms of their deal.[8]

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[8] Permissive detariffing would operate in a manner analogous to the role of the Uniform Commercial Code in contracts for the sale of goods. Parties to such contracts may specify that the "default" provisions in the UCC do not govern their relationship, and instead may specify alternative terms. Similarly, carriers and customers may provide that any or all of the terms in the contract apply in lieu of otherwise applicable tariff provisions.

APPENDIX B

(Sample Tables of Contents)

Topic	Sample #1	Sample #2	Sample #3
Performance standards; procedures for reporting and tracking outages	§§ 2.6, 2.13, 2.18, 5.5, 14.1, 14.3	§§ 2.7, 2.9, 2.16, 4.6, 5.4, 14.1, 14.3, Attachment PS	§§ 2.6, 2.8, 2.10, 2.19, 4.4, 5.5, 14.2, 14.3, Attachments AC and PS
Requirements for vendor staffing	§§ 3.1, 3.2	§§ 3.1-3.3, 8.6	§§ 3.1-3.4, 8.7, Attachment KP
Requirements for carrier invoices	§§ 2.9, 2.10, 5.4	§ 2.10, 5.5, Attachment BI	§§ 2.11, 2.12, 5.6, Attachment BI
Network management services, reporting	§ 2.14, Attachment NM	§ 2.11, Attachment NM	§ 2.14, Attachment NM
Disaster recovery procedures	§ 2.15	§ 2.14, Attachment DRP	§ 2.17
Informal dispute resolution		§ 15.8	§ 15.12
Arbitration	§ 15.12	§ 15.9	
Obligations relating to changes in customer requirements	§§ 2.4, 2.5, 2.12, 4.1-4.2, 5.2, 5.3	§§ 2.4, 2.5, 2.12, 4.1-4.5, 5.2, 5.3	§§ 2.4, 2.5, 2.15, 4.1-4.5, 5.3, 5.4

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Attachment IS	Installation Sites
Attachment ND	Form of Non-Disclosure Agreement
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